STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2021AP708-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CATTI J. MEISENHELDER,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR CALUMET COUNTY, THE HONORABLE JEFFREY S. FROEHLICH PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

JOSHUA L. KAUL
Attorney General of Wisconsin

SONYA K. BICE
Assistant Attorney General
State Bar #1058115

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3935
(608) 294-2907 (Fax)
bicesk@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

ISSUE PRESENTED

The search incident to arrest exception to the warrant requirement makes "certain areas of search . . . per se reasonable."[1] It requires a contemporaneous lawful arrest, and, under *Gant*, the scope of such a search is the area "within reaching distance" of an unsecured arrestee.[2] When officers arrested Defendant-Appellant Catti J. Meisenhelder in a Walmart store office, they searched the purse she'd used to conceal shoplifted items. She was present and not handcuffed. Officers found a vial containing methamphetamine.

Was the evidence admissible as the fruit of a valid search incident to arrest?

The circuit court answered yes.

This Court should answer yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither. This case can be decided on the briefs and involves applying well-settled law to facts.

INTRODUCTION

This case involves a search conducted during a routine arrest for shoplifting. The following facts are undisputed: probable cause supported Meisenhelder's arrest for retail theft; the items had been concealed in Meisenhelder's purse; the search of Meisenhelder's purse was lawful; and the search occurred within feet of Meisenhelder, who was not

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[1] *State v. Murdock*, 155 Wis. 2d 217, 228, 455 N.W.2d 618 (1990), (*overruled as to the scope of vehicle searches by State v. Dearborn*, 2010 WI 84, 327 Wis. 2d 252, 786 N.W.2d 97) ("Given a valid arrest, . . . *Chimel* creates a rule in which certain areas of search are per se reasonable.").

[2] *Arizona v. Gant*, 556 U.S. 332 (2009).

handcuffed. The sole question is whether any law required officers who were lawfully arresting Meisenhelder to obtain a warrant to open the vial they found in her purse. None does.

The constitutionality of a search incident to a lawful arrest is premised on the need to protect officers and prevent the arrested person from reaching destructible evidence. Evidence obtained in such a search is admissible if the State shows that 1) the search was contemporaneous to a lawful custodial arrest based on probable cause that existed prior to the search, and 2) the scope of the search does not exceed the "reaching distance" of an unsecured arrestee.[3] Everything found in a search incident to arrest—with the exception of digital data in computers and cell phones, which can't be searched without a warrant even if seized incident to arrest[4]—is admissible when this two-prong test is satisfied. Meisenhelder's argument that opening the vial was outside the scope of a search incident to arrest has no support in *Arizona v. Gant* or post-*Gant* cases in Wisconsin or other jurisdictions, which consistently apply the "reaching distance" rule. Nor is there support for the proposition that the presence of officers affects the "reaching distance" analysis.

The search here occurred during a lawful custodial arrest based on probable cause that existed before the search, and the purse was within "reaching distance" of Meisenhelder when she was unsecured in the security office. It was therefore a valid search incident to arrest, and the circuit court correctly denied the motion to suppress. This Court should affirm.

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[3] *Dearborn*, 327 Wis. 2d 252, ¶ 26 (quoting *Gant*, 556 U.S. at 343).

[4] *Riley v. California*, 573 U.S. 373, 403 (2014) ("Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.").

STATEMENT OF THE CASE

Meisenhelder was arrested and charged.

Meisenhelder was arrested at an Appleton Walmart after store security staff caught her shoplifting, detained her in an office, and called police. (R. 3:2.) Police officers arrived, searched Meisenhelder's purse, and found a vial containing methamphetamine. (R. 3:3.) The State charged Meisenhelder with misdemeanor retail theft, possession of methamphetamine, and possession of drug paraphernalia. (R. 3:1–2.)

Meisenhelder moved to suppress the evidence of the methamphetamine.

Meisenhelder moved to suppress the evidence of the drugs on the ground that the search of the vial violated her right to be free of unreasonable searches. (R. 19:1.)

At the hearing on the motion, the State presented the testimony of Officer Jordan Woelfel. (R. 49:3–22.) The facts that follow are taken from his testimony.[5]

Woelfel and a second officer were dispatched to Walmart on July 12, 2019. (R. 49:6–7.) When they arrived, they found Meisenhelder in the office with two store employees. (R. 49:7.) After seeing Meisenhelder conceal items and attempt to leave the store with them, security staff had stopped her and asked her to wait in an office while they called police. (R. 49:7, 9.) The store employees informed Woelfel the two items she took had been concealed in her purse; the items were on a desk when officers arrived. (R. 49:10–11, 21.) Woelfel then "took [Meisenhelder's purse] off the seat next to her" and gave it to the second officer to

[5] The two officers present at Meisenhelder's arrest wore body cameras; the videos were played at the hearing. (R. 49:9.) Transcripts prepared by the district attorney's office were attached to the State's response to Meisenhelder's motion. (R. 23:4; 24.)

search. (R. 49:10.) At the same time, Woelfel told Meisenhelder, "I have to check inside your bag and make sure you don't have anything else." (R. 49:14.) Inside the purse, the officer found a "purple vial-like container" attached to a key ring. (R. 49:11, 15.) He unscrewed the top and found a clear baggie with a white, crystal substance inside. (R. 49:11–12.) Meisenhelder then "appeared to get emotional" and said that she'd forgotten "that was in there." (R. 49:12.) Woelfel then arrested Meisenhelder, read her the *Miranda* warnings, and handcuffed her. (R. 49:12.) Meisenhelder admitted the substance in the vial was methamphetamine. (R. 49:18.) When officers subsequently searched Meisenhelder, she gave them baggies with "minute, small amounts" of a crystalline substance. (R. 49:18.) The events in the office took less than five minutes. (R. 49:12.)

Woelfel testified that regardless of the discovery of the vial, he would have arrested Meisenhelder for the retail theft. (R. 49:19.)

The Court denied the motion in a written order. (R. 28.) The Court relied on *State v. Sykes,* stating that the search of the purse, and discovery of the vial therein, was a valid search incident to arrest and thus an exception to the warrant requirement. 2005 WI 48, 279 Wis. 2d 742, 695 N.W.2d 277. (R. 28:2–3.)

Meisenhelder entered a no-contest plea to possession of methamphetamine, and the State agreed to dismiss the remaining counts as read-ins. (R. 16; 30.) She was convicted. (R. 36.)

This appeal follows. (R. 40.)

ARGUMENT

The vial in Meisenhelder's purse was opened as part of a valid search incident to her arrest for retail theft.

A. Standard of review.

In reviewing the denial of a motion to suppress evidence, a court upholds a circuit court's findings of historical fact unless they are clearly erroneous. *State v. Vorburger*, 2002 WI 105, ¶ 32, 255 Wis. 2d 537, 648 N.W.2d 829. It reviews *de novo* the circuit court's application of constitutional principles to those facts. *Id.*

B. Principles of law.

"The right to be secure against unreasonable searches and seizures is protected by both the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Wisconsin Constitution." *State v. Dearborn*, 2010 WI 84, ¶ 14, 327 Wis. 2d 252, 786 N.W.2d 97. Wisconsin courts "have historically interpreted the Wisconsin Constitution's protections in this area identically to the protections under the Fourth Amendment as defined by the United States Supreme Court." *Id.*

The search-incident-to-arrest requirements: arrest based on existing probable cause and limited spatial scope.

In *Chimel*, "the principle was established that officers may search the area an arrestee might be able to reach—an area 'within his immediate control'—in the course of an arrest." *Dearborn*, 327 Wis. 2d 252, ¶ 20 (quoting *Chimel v. California*, 395 U.S. 752, 762–63 (1969)). *Chimel* had held that "[t]here is ample justification . . . for a search of the arrestee's person and the area . . . from within which he might gain possession of a weapon or destructible evidence." *Chimel*, 395 U.S. at 763.

"A search may be incident to a subsequent arrest if the officers have probable cause to arrest before the search." *State v. Kiekhefer*, 212 Wis. 2d 460, 484, 569 N.W.2d 316 (Ct. App. 1997) (citing *Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980)). "[W]hen a suspect is arrested subsequent to a search, the legality of the search is established by the officer's possession, before the search, of facts sufficient to establish probable cause to arrest followed by a contemporaneous arrest." *Sykes*, 279 Wis. 2d 742, ¶ 16.

Following *Belton*, a decision of the United States Supreme Court that applied *Chimel* in a vehicle search context, "Wisconsin, like nearly every other jurisdiction to address the question, . . . understood *Belton* to adopt a bright-line rule allowing the search of passenger compartments, even if the arrestee *did not have access* to the passenger compartment at that time." *Dearborn,* 327 Wis. 2d 252, ¶ 23 (emphasis added).

In *Dearborn*, Wisconsin amended its interpretation of *Belton* in accordance with *Arizona v. Gant*, the United States Supreme Court's 2009 decision that "rejected the prevailing interpretation of *Belton*" and held "that the *Chimel* rationale 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*, 327 Wis. 2d 252, ¶ 26 (quoting *Arizona v. Gant*, 556 U.S. 332, 343 (2009)) (emphasis added).

As the Wisconsin Supreme Court explained, *Gant* "went beyond *Chimel* and further held" that because of "circumstances unique to the vehicle context," a search of an inaccessible vehicle incident to a lawful arrest is encompassed in the search incident to arrest exception when it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *Id.* (quoting *Gant*, 556 U.S. at 343). In other words, in that context, it does not matter that there's no threat to officer safety or evidence destruction.

Where a search incident to arrest does *not* involve a vehicle, the Wisconsin Supreme Court held, in applying *Chimel*, that evidence is lawfully obtained where "law enforcement's search was confined to the area immediately surrounding" the arrestee. *Sykes*, 279 Wis. 2d 742, ¶ 21.

Interpreting *Gant* in a case involving a non-vehicle search incident to arrest, the Seventh Circuit Court of Appeals found valid a search of a bag a defendant was carrying at the time of his arrest:

> A search incident to arrest is valid if it does not extend beyond "the arrestee's person and the area within his immediate control." The zone of "immediate control" includes "the area from within which [the suspect] might gain possession of a weapon or destructible evidence." *When he was detained, Hill was holding the bag* containing his hoard of dye-stained cash and was plainly exercising immediate control over it. [The] search was therefore a permissible search incident to arrest . . . .

United States v. Hill, 818 F.3d 289, 295 (7th Cir. 2016) (emphasis added) (quoting *Gant*, 556 U.S. at 339). In another post-*Gant* case considering the search of a bag a defendant had at the time of arrest, the Seventh Circuit stated the rule categorically:

> The search of [the] bag was valid as a search incident to arrest, because the Fourth Amendment permits officers to search, without a warrant, *any container carried by an arrestee, including bags, purses, wallets, and books.*

United States v. Rutley, 482 F. App'x 175, 177 (7th Cir. 2012) (emphasis added).

Other circuits similarly hold that searches of the items in bags and purses are not limited so long as the item is in the arrestee's immediate area. *See*, e.g., *United States v. Shakir*, 616 F.3d 315, 321 (3d Cir. 2010) (warrantless search of bag was proper search-incident-to-arrest even though defendant

was handcuffed and guarded by two policeman when bag was at defendant's feet and thus accessible to him); *United States v. Ferebee*, 957 F.3d 406, 419 (4th Cir. 2020) (warrantless search of arrestee's backpack was proper search incident to arrest under *Gant* despite the fact that arrestee was handcuffed where body cam video showed he "could reach the other officers and the backpack within seconds"); *United States v. McLaughlin*, 739 F. App'x 270, 275–76 (5th Cir. 2018) (stating that "officers may search the arrestee himself, as well as certain containers that were located either on the arrestee's person or within his reach at the time of his arrest" and upholding a search of an envelope defendant was carrying when arrested even though defendant was handcuffed at the time of the search); *United States v. Perdoma*, 621 F.3d 745, 750–53 (8th Cir. 2010) (warrantless search of bag in public bus terminal was appropriate after *Gant* even though defendant was handcuffed and in the presence of several police officers); *United States v. Cook*, 808 F.3d 1195, 1199–1200 (9th Cir. 2015) (search of backpack was proper under *Gant* even though defendant was face-down on the ground with his hands cuffed behind his back at the time of the search because there was an objectively reasonable possibility that the defendant could break free and reach the backpack); *United States v. Ouedraogo*, 824 F. App'x 714, 720 (11th Cir. 2020) ("even absent probable cause or suspicion of danger, police can routinely search individuals and personal items the individuals have on them when they are arrested and seize anything probative of proving criminal conduct").

Discussing *Gant*'s application outside of the vehicle search context, Professor Wayne LaFave stated that the rule appears to be, "in any case where search of a container is purported to be incident to arrest of the person who had possessed it," that the "'possibility of access' must be judged as of 'the time of the search,'" and that "such access is deemed possible *only* 'when the arrestee is unsecured and within

reaching distance.'" 3 Wayne R. LaFave, *Search & Seizure: A Treatise on the Fourth Amendment* § 5.5(a) (6th ed. 2020).

C. The vial's contents were discovered as part of a valid search incident to Meisenhelder's arrest.

Meisenhelder's arrest was based on probable cause that existed prior to the search of her purse. *See Sykes*, 279 Wis. 2d 742, ¶ 16. Meisenhelder has not challenged the validity of the arrest. (Meisenhelder's Br. 14.) The search occurred within reaching distance of Meisenhelder while she was unsecured, as reflected by the body cam video and the testimony of the officer. (R. 49:9, 10.) It was therefore a valid search incident to her arrest. *See Gant*, 556 U.S. at 343.

Meisenhelder argues that the search of the vial exceeded the scope of the permitted search because *Gant* requires that it be "reasonable to believe evidence relevant to the crime of arrest might be found" in the place searched. (Meisenhelder's Br. 15–16.) That part of *Gant*, which added to the *Chimel* rule, applies only where police search a *vehicle* an arrestee does not have access to. *Gant*, 556 U.S. at 343.

Meisenhelder further argues that with "four officers in the loss prevention office," she did not have "access to her purse in this situation." (Meisenhelder's Br. 16.) But she cites no law that applies this standard of physical control to a search analysis, and her argument requires ignoring the actual legal standard from *Gant*: "within reaching distance . . . at the time of the search." *Gant*, 556 U.S. at 343.

Meisenhelder relies on a Ninth Circuit vehicle search case for the proposition that the search of the vial was outside the scope of the permitted search. (Meisenhelder's Br. 16.) *United States v. Maddox*, 614 F.3d 1046 (9th Cir. 2010), involves a search of a container in a vehicle while the arrestee was "handcuffed in the back of the squad car." *Id.* at 1048. The arrestee in that case was secured and outside of reaching

distance of the container, unlike Meisenhelder, who was "unsecured and within reaching distance" of the container. *Gant*, 556 U.S. at 343. *Maddox* has no relevance here.

Meisenhelder argues that "[t]he vial could not contain destructible evidence." (Meisenhelder's Br. 18.) But it actually did. The methamphetamine inside the vial was destructible evidence. She further argues that because "she was in a room with four officers and could not reasonably access the vial" (Meisenhelder's Br. 18) the search is invalid under *Gant*, but she cites no case that supports the proposition that the presence of officers negates the "reaching distance" analysis. As shown above, courts routinely find the "reaching distance" prong of the analysis satisfied even when an arrestee is in the presence of officers.

Meisenhelder faults the circuit court for relying on *Sykes*, "with the apparent belief that once there is probable cause to arrest there is no limitation on the scope of the search." (Meisenhelder's Br. 17.) The circuit court's written decision shows that it did in fact apply the correct scope limitation by noting that in both *Sykes* and the instant case, the search occurred "in the immediate area" of the arrestee:

> The officer in *Sykes* found the wallet *in the immediate area* and searched it for evidence of his identity and found a controlled substance. The Court in *Sykes* found this to be a valid search incident to arrest under *Chimel v. California*, 395 U.S. 752 (1969). Here Officer Woelfel obtained the defendant's bag which was *in the immediate area* and used in the commission of the alleged offense.

(R. 28:2 (emphasis added).)

It is true that the *Sykes* case did not raise the issue of the proper scope of the search, as Meisenhelder points out. (Meisenhelder's Br. 18.) But both *Sykes* and the circuit court's decision cite the correct legal standard for the scope of a search incident to arrest.

Meisenhelder's arrest was lawful and the contemporaneous search of her purse and the vial inside it was done while she was "unsecured and within reaching distance" of the purse. These facts are dispositive of the analysis. The circuit court correctly denied Meisenhelder's motion to suppress the evidence.

CONCLUSION

This Court should affirm the judgment of conviction.

Dated this 11th day of October 2021.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Sonya K. Bice
SONYA K. BICE
Assistant Attorney General
State Bar #1058115

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3935
(608) 294-2907 (Fax)
bicesk@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,825 words.

Dated this 11th day of October 2021.

Electronically signed by:

Sonya K. Bice
SONYA K. BICE
Assistant Attorney General

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 11th day of October 2021.

Electronically signed by:

Sonya K. Bice
SONYA K. BICE
Assistant Attorney General