State of Wisconsin
Court of Appeals
District 2
Appeal No. 2010AP001107 - CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Cian Cantwell,

Defendant-Appellant.

Appeal from an order of the Kenosha County Circuit Court, the Honorable Barbara Kluka, presiding, denying the defendant's motion to suppress evidence.

Defendant-Appellant's Brief

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Statement on Oral Argument and Publication

The issue presented by this appeal involves the application of the United States Supreme Court's recent decision in *Arizona v. Gant*, and, therefore, oral argument is recommended, as well as publication.

Statement of the Issues

Whether the trial court erred in denying Cantwell's motion to suppress evidence, where the testimony established that, at the time Cantwell's vehicle was searched, he was already out of the vehicle, and he was under arrest for operating under the influence of alcohol; and where the officer discovered a small amount of marijuana in the pocket of a backpack that was located in the back seat of the car.

ANSWERED BY THE TRIAL COURT: No

Summary of the Argument

Cantwell does not challenge the trial court's findings of historical fact; rather, the issue on appeal is whether the search of Cantwell's vehicle was reasonable under the Fourth Amendment. The appellate court pays no deference to the trial court's finding of constitutional fact. Here, Deputy Gomez first had contact with Cantwell in order to determine whether Cantwell needed assistance. During this initial, and probably

reasonable, contact with Cantwell, the deputy developed a reasonable suspicion that Cantwell might be operating under the influence of alcohol. During this initial investigation, though, the officer did not observe Cantwell to be going into any part of the interior of the vehicle. Rather, Gomez shined his flashlight into the interior of the car and saw nothing except a black backpack in the back seat. Cantwell was ordered out of the vehicle, and he was subsequently arrested for operating under the influence of alcohol. Cantwell was in the back seat of the police cruiser when Gomez searched the interior of Cantwell's vehicle. As part of this search, Gomez went into an "open" side pocket on the backpack and found a small amount of marijuana. This search was patently unreasonable because: (1) Cantwell was under arrest for operating under the influence of alcohol, and Gomez had no probable cause to believe that the interior of the vehicle contained evidence of that offense; (2) In any event, the area searched by Gomez could not possibly have hidden a container of alcoholic beverage; and, (3) If this search were reasonable, it amounts to a total abrogation of the holding in *Gant,* because *whenever* a person is arrested in a vehicle, evidence of the crime might be hidden in "just about any part of the vehicle."

Statement of the Case

I. Procedural Background

The defendant-appellant, Cian Cantwell (hereinafter "Cantwell") was charged with operating under the influence of an

intoxicant, possession of drug paraphernalia, and possession of marijuana arising out of an incident that occurred in Kenosha County on July 5, 2008. (R:1) In short, Cantwell was stopped for erratic driving and, after a short investigation, the officer removed Cantwell from the vehicle, and he arrested Cantwell for operating under the influence of alcohol. After Cantwell was already under arrest and out of the vehicle, the officer searched the interior of the vehicle. In a backpack located in the back seat of the car, the officer found a small amount of marijuana in a side pocket. Cantwell entered pleas of not guilty.

Cantwell filed a motion to suppress evidence of the marijuana that the officer found in the backpack. Approximately one month before the scheduled hearing on the motion, the United States Supreme Court decided *Arizona v. Gant*, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009).

On May 21, 2009, the trial court in this case held a fact-finding hearing into Cantwell's motion to suppress, but then the court ordered briefs concerning the application of *Gant.* Thereafter, the court denied Cantwell's motion, reasoning:

> So, Gant says if there is a-- can officers search a car incident to the driver's arrest after that offier-- after that driver is handcuffed, placed in a squad car, and obviously no longer is able to have access to any weapons which may be found in the car; and Gant says no. But can the officer search that care if it is reasonable to expect that evidence of the offense of the arrest will be found; and Gant says yes, in the interest of evidence preservation. And I find that that factor or that prong is satisfied in this case.

> It was reasonable for this officer, once he arrested Mr. Cantwell for operating under the influence of an intoxicant to expect that he might find evidence of alcohol consumption or other substance consumption in the car itself; and therefore, I conclude that the search was reasonable and permitted under Gant

(R:29-8, 9).

Cantwell later pleaded guilty to possession of marijuana and operating under the influence. The paraphernalia charge was dismissed. On the marijuana charge, the court sentenced Cantwell to pay a $300 fine. (R:19)

II. Factual Background (Motion to Suppress)

Kenosha County Deputy Sheriff David Gomez was on routine patrol on July 5, 2008, when he observed a vehicle that was ahead of him travel into the far right lane, and then the car eventually into the right emergency lane, where it stopped. (R:28-6) Gomez then pulled his squad car in behind the other vehicle to "see whether the driver needed assistance". *Ibid* p. 7. Gomez identified Cantwell as the driver of that other vehicle. *Id.*

Gomez asked Cantwell if he needed any help, and Cantwell indicated that he did not, saying that he was "fine". *Ibid* p. 9 Nonetheless, Gomez testified that, at that point, he noticed that Cantwell's speech was slurred, and Gomez could smell the "odor of intoxicants." *Id.* Gomez asked Cantwell whether he had been drinking, and Cantwell denied it. *Id.* Gomez shined his flashlight into the back seat, and he saw a black backpack,

but he did not see any bottles of intoxicants or other paraphernalia. *Ibid.* p. 24 Likewise, there were no bottles of intoxicants in the front seat either. *Ibid* p. 25

Nonetheless, Gomez ordered Cantwell out of the vehicle for the purpose of conducting field sobriety tests. *Ibid* p. 10. Cantwell lightly protested, but he eventually got out of the vehicle. Cantwell was moved some thirty feet away from his vehicle. *Ibid* p. 29 He did not perform the field tests to the deputy's satisfaction and, therefore, Gomez arrested Cantwell for operating under the influence of alcohol. *Ibid* 15-16. Gomez handcuffed Cantwell, and then he placed him in the back of the squad car. *Id.*

Gomez then offered this curious bit of testimony, "I went back to the vehicle and searched it *incident to arrest* checking for any fruits of the crime, possibly open intoxicants, whatnot." *Id.* According to Gomez, he intended to search, "Anywhere within the vehicle. I [have] found them in the glove box. I found in the armrest [sic], under the seat spilled . . . I've seen that. All over the vehicle." *Id.* According to Gomez, he has found intoxicants, "Pretty much every single place in a car." *Ibid* p. 17.

During the search of Cantwell's vehicle, then, Gomez testified that he:

> [F]ound a glass pipe approximately four inches in length in the center armrest. I found, I think, $784 in 20's in the glove box; and in a black backpack behind the driver's seat I found, I believe, five grams which tested to be positive for THC.

Id. Gomez later clarified that he found the marijuana in a side pocket on the backpack. *Ibid* p. 30

Argument

I. The trial court erred in denying Cantwell's motion to suppress the evidence seized from the interior of the vehicle.

Cantwell does not challenge the trial court's findings of historical fact; rather, the issue on appeal is whether the search of Cantwell's vehicle was reasonable under the Fourth Amendment. The appellate court pays no deference to the trial court's finding of constitutional fact. Here, the Deputy Gomez first had contact with Cantwell in order to determine whether Cantwell needed assistance. During this initial, and probably reasonable, contact with Cantwell, the deputy developed a reasonable suspicion that Cantwell might be operating under the influence of alcohol. During this initial investigation, though, the officer did not observe Cantwell to be going into any part of the interior of the vehicle. Rather, Gomez shined his flashlight into the interior of the car and saw nothing except a black backpack in the back seat. Cantwell was ordered out of the vehicle, and he was subsequently arrested for operating under the influence of alcohol. Cantwell was in the back seat of the police cruiser when Gomez searched the interior of Cantwell's vehicle. As part of this search, Gomez went into an "open" side pocket on the backpack and found a small amount of marijuana. This search was patently unreasonable because: (1) Cantwell was under arrest for operating under the influence of alcohol, and Gomez had no probable cause to believe that the interior of the vehicle contained evidence of that offense; (2) In any

event, the area searched by Gomez could not possibly have hidden a container of alcoholic beverage; and, (3) If this search was reasonable, it amounts to a total abrogation of the holding in *Gant,* because whenever a person is arrested in a vehicle, evidence of the crime might be hidden in "just about any part of the vehicle."

A. Standard of Appellate Review

Cantwell does not challenge the trial court's findings of historical fact. Rather, the challenge is whether, under those facts, the officer's search of the vehicle was reasonable. Whether a search is reasonable is a question of constitutional fact, which the appellate court determines independently of the trial court's conclusion. *State v. Griffin*, 131 Wis. 2d 41, 62, 388 N.W.2d 535 (1986).

B. The search of the interior of a vehicle, where the defendant is already out of the vehicle, is patently unreasonable unless the officer has probable cause to believe that the vehicle contains evidence of the crime for which the defendant is under arrest.

"The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that 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." *Mincey v. Arizona*, 437 U.S. 385, 390, 98 S. Ct.

2408, 57 L. Ed. 2d 290 (1978) (citation omitted). One such exception is where an otherwise protected area is searched incident to a lawful arrest.

1. The search of the interior of the car generally

In, *Arizona v. Gant*, 129 S. Ct. 1710 (2009), though, the United States Supreme Court made clear that the search of the interior of a vehicle, incident to arrest, is patently unreasonable where the defendant is already out of the vehicle (i.e. where the defendant is outside of the "grasp area" for weapons). The holding in *Gant*, though, does not prohibit a search where the officer possesses probable cause to believe that the vehicle contains evidence of the offense for which the defendant is arrested. The Supreme Court explained:

> Under our view, *Belton* and *Thornton* permit an officer to conduct a vehicle search when an arrestee is within reaching distance of the vehicle or it is reasonable to believe the vehicle contains evidence of the offense of arrest. Other established exceptions to the warrant requirement authorize a vehicle search under additional circumstances when safety or evidentiary concerns demand. For instance, *Michigan v. Long*, 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983), permits an officer to search a vehicle's passenger compartment when he has reasonable suspicion that an individual, whether or not the arrestee, is "dangerous" and might access the vehicle to "gain immediate control of weapons." Id., at 1049, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (citing *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). If there is probable

> cause to believe a vehicle contains evidence of criminal activity, *United States v. Ross*, 456 U.S. 798, 820-821, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982), authorizes a search of any area of the vehicle in which the evidence might be found. Unlike the searches permitted by Justice Scalia's opinion concurring in the judgment in Thornton, which we conclude today are reasonable for purposes of the Fourth Amendment, Ross allows searches for evidence relevant to offenses other than the offense of arrest, and the scope of the search authorized is broader. Finally, there may be still other circumstances in which safety or evidentiary interests would justify a search. Cf. *Maryland v. Buie*, 494 U.S. 325, 334, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990)(holding that, incident to arrest, an officer may conduct a limited protective sweep of those areas of a house in which he reasonably suspects a dangerous person may be hiding).

129 S. Ct. at 1720.

In an apparent attempt to avoid holding of *Gant*, Deputy Gomez testified at the motion hearing that his *real* reason for searching Cantwell's vehicle was to discover "fruits of the crime" of Cantwell operating under the influence of alcohol. This preposterous suggestion should be given short shrift by the court.

Firstly, Gomez had no probable cause to believe that Cantwell's vehicle contained evidence of *operating under the influence*. At the outset, Gomez shined the flashlight into the interior of the car, and he saw nothing but a black backpack in the back seat. Gomez explained that he searched the interior of the vehicle because, in his opinion, the vehicle *might* contain containers of alcoholic beverages. This "opinion" was based

on the deputy's general impression that intoxicants could be hidden in "just about any part of the car". The fact that an area could conceivably contain evidence, though, is a far cry from probable cause to believe that the area does, in fact, probably contain the evidence. Before an area in the car may reasonably be searched the officer must have specific reason to believe that the area probably does contain evidence. For example, in, *State v. Williams*, 2010 WI App 39, P23 (Wis. Ct. App. 2010), the Court of Appeals held that the search of the interior of a vehicle was *not* prohibited by *Gant* in part because the suspect (Williams) was observed by officers going into the center console as the officers approached the vehicle.

Significantly, possession of *containers* of alcohol beverages is not necessarily relevant evidence that the person was operating a motor vehicle while under the influence of alcohol. In order to prove that charge, the state must show that the defendant was operating a motor vehicle on a public roadway; and, that the person's ability to driver safely was impaired by the consumption of alcohol. The fact that there is a container of alcohol within the interior of a car makes it no more or less likely that the person's ability to drive safely was impaired by the consumption of alcohol. It is not against the law to drive a car after having had something to drink.

Thus, the search of the interior of Cantwell's vehicle was unreasonable. All evidence, including the marijuana pipe and the baggie of marijuana, must be suppressed.

2. The search of the backpack specifically

Cantwell was under arrest for operating under the influence of *alcohol*. Thus, even if containers of alcohol might be relevant

evidence of that offense, it is important to emphasize that the "side pocket" of the backpack where Gomez found the marijuana (and which Gomez says was "open"), could not have contained *alcoholic* beverages. Moreover, Gomez never saw Cantwell going into the backpack. Therefore, even if it were reasonable for Gomez to generally search the interior of the vehicle, it was unreasonable for him to search the side pocket of the backpack.

3. The search of the center console specifically

The deputy also found a glass marijuana pipe in the center console. Unlike in *Williams*, though, Deputy Gomez never observed Cantwell accessing the center console. Additionally, although it was Gomez's opinion that the center console could possibly contain one twelve-ounce can of beer, under the facts of this case it is simply not reasonable to suspect that the center console in Cantwell's car contained a can of beer. It is not *reasonable* because the deputy could not give any reason for suspecting that Cantwell put a can of beer in the console except for the deputy's general believe that intoxicants could possibly be hidden in "just about any part of a car."

4. Does Gant bar any search of a vehicle?

If the trial court's conclusion that the search of Cantwell's vehicle was, in this case, *reasonable*-- then it is tantamount to a categorical determination that *Gant* does not apply when the driver is arrested for operating under the influence of alcohol. Gomez, unlike the officers in *Williams*, had no specific suspicion that Cantwell had hidden evidence in any part of the

vehicle. Rather, Gomez testified that the search in this case was motivated by his *general experience*; that is, that, in the past, he has found intoxicants in *just about every part of a car*.

Therefore, if the trial court's reasoning is affirmed, every part of a car is subject to search-- no matter how implausible it is that the area may contain intoxicants-- whenever the driver is arrested for operating under the influence of intoxicants, *regardless of whether the officer has a specific suspicion that evidence is hidden there*. Similar reasoning applies to any offense that potentially involves small bits of evidence that may be hidden "in any part of a car."

Conclusion

For the foregoing reasons, it is respectfully requested that the court of appeals reverse the order of the circuit court denying Cantwell's motion to suppress evidence, and order that all evidence seized during the search of the vehicle be suppressed. The court should further order that Cantwell be permitted to withdraw his guilty plea.

Dated at Milwaukee, Wisconsin this ____ day of _____, 2010.

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Certification as to Length and E-Filing

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 3000 words.

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Dated this _____ day of
_____, 2010:

_____
Jeffrey W. Jensen

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Court of Appeals
District 2
Appeal No. 2010AP001107 - CR

State of Wisconsin,

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Defendant-Appellant's Appendix

A. Record of Appeal

B. Excerpt of trial court's bench decision denying motion to suppress

> I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2010

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