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# *Between the Lines*

## **Aftermath of Arizona v Gant: The Limited Effect on Search and Seizure in Vehicles**

**By Mark M. Neil\***

The United States Supreme Court's decision in *Arizona v Gant*<sup>i</sup> was arguably a limitation on the ability of law enforcement to conduct a search of an automobile incident to the arrest of the driver or an occupant. Seen by many as a curtailment of the practices under *New York v Belton*<sup>ii</sup> by removing the incentive for pretextual stops, the actual impact of the decision may be academic rather than realistic.<sup>iii</sup>

In order to judge the impact of *Gant*, it is important to understand how limited in focus the holding really was. *Gant* was arrested well outside of his vehicle on an outstanding warrant for driving on a suspended driver's license. Officers had seen *Gant* drive by, park and walk away from his vehicle. Incident to his arrest, a search of the car revealed a gun and a bag of cocaine in the pocket of a jacket in the backseat. The Court reasoned that because *Gant* was handcuffed and could not access the interior of the vehicle to retrieve weapons or evidence, the search was not justified.

### ***The Aftermath***

*Gant* provided direction for two situations: (1) when conducting a vehicle search incident to arrest when an arrestee is within reaching distance of the vehicle; and (2) when it is reasonable to believe the vehicle contains evidence of the arrest offense or warrant. The facts and circumstances of the case necessarily limited the application of *Gant* and, subsequently, its impact. It is important to note the two situations are distinct and not dependent on each other.

In the case of a search incident to arrest for any offense, the question is what is "within reaching distance" of the vehicle. The answer to this should most often be a factual determination and might be examined under the familiar 'lunge and reach' caselaw precedents. The test here would be whether it is reasonable for the officers to believe the subject is within reaching distance. Where the defendants were detained outside of the vehicle unrestrained, but not formally arrested, handcuffed or secured and the officers outnumbered the detainees, a court could find the officers could not reasonably believe they were within reaching distance of the passenger compartment.<sup>iv</sup>

When the situation turns to an arrest for either an offense committed while in the vehicle or for an outstanding warrant, the question turns to when it is reasonable to believe the vehicle contains "evidence of the offense or warrant." Because of the arrest, the probable cause otherwise required is not necessary and the officer's actions only need be reasonable. The 'reasonable to believe' standard equates to the well-known Terry standard of 'reasonable suspicion.'<sup>v</sup> This can best be described as where the search is for evidence of crime of arrest and is predicated upon "the facts known to the police officer at the time of the search, coupled with his common sense, based on his experience, training and the totality of the circumstances."<sup>vi</sup>

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Many times the offense itself determines that reasonableness. The offenses most often associated with vehicles are those involving driving under the influence or while impaired. The vehicle itself is an instrumentality of the crime as well as the conveyance of any evidence. A search incident to an arrest for driving under the influence will often reveal a wealth of evidence of consumption of the alcohol or other drugs causing the impairment such as empty alcoholic beverage containers, bar receipts, and drug paraphernalia. However, should the scope of a search go beyond evidence of the elements of the underlying offense, that search would be illegal.<sup>vii</sup>

In a situation where the arrest is made on the basis of an outstanding warrant unrelated to the operation of the vehicle, the underlying offense controls the reasonableness evaluation. Is it reasonable to believe that the vehicle may contain drugs when arresting the driver on a warrant for sale or delivery of a controlled substance versus a warrant for driving on a suspended license as in the case of *Gant*? If there is no reasonable basis to believe the vehicle contains relevant evidence of the crime of arrest the nature of the offense would preclude a search incident to arrest.<sup>viii</sup>

### ***Did Not Modify Existing Standards***

It has been repeatedly noted that *Gant* did nothing to modify the standards regarding searches pursuant to the automobile exception to the search warrant requirement.<sup>ix</sup> Where the search is justified by this exception, it is not necessary to determine whether it was also justified by being incident to an arrest.<sup>x</sup>

### ***Named Exceptions***

The *Gant* opinion also noted other exceptions to the warrant requirement that survived and were available: Frisk for weapons; probable cause of evidence of a crime; and protective sweeps.

An officer is permitted to frisk the vehicle's passenger compartment when they have reasonable suspicion that an individual, whether or not the arrestee, is dangerous and might access the vehicle to gain immediate control of weapons.<sup>xi</sup> Narrowing of the ability to search incident to arrest did not affect the validity of *Michigan v Long* and an officer is permitted to search vehicle when safety or evidentiary concerns demand. Where no arrest made, officer may still search if they reasonably believe suspect is dangerous and may gain immediate control of a weapon.<sup>xii</sup>

When conducting a search based on independent probable cause of the evidence of a crime, the fact of an arrest is irrelevant. Probable cause to believe a vehicle

contains evidence of criminal activity has long been relied upon in permitting a warrantless search.<sup>xiii</sup> *Gant* did not modify the standards regarding searches made pursuant to the automobile exception.<sup>xiv</sup> If probable cause exists to believe a vehicle contains evidence of criminal activity, an officer is allowed to search for evidence relevant to offenses other than the offense of arrest and the scope of the search authorized is broader.<sup>xv</sup>

For example, the police lawfully searched a vehicle after the driver handed the officer a marijuana cigarette. This search was not result of traffic violation. Rather, the defendant's act of possession of marijuana inside vehicle established probable cause.<sup>xvi</sup>

A protective sweep involving a vehicle is one of officer safety and the nature of the vehicle may control the extent of the sweep.<sup>xvii</sup> Multi-passenger vans, recreational vehicles, motor homes, buses and tractor-trailer rigs pose unique safety issues for roadside officers dealing with a suspect.

### ***Other Exceptions***

Other exceptions not specifically outlined by the Court in *Gant* also survive and may be considered. While not an exhaustive list, the most common would include consent, inventory, abandonment and plain view.

**Consent:** The easiest of all exceptions to the search warrant requirement is the one of consent. So long as the defendant makes a knowing and intelligent waiver of his rights, the officer may search without a warrant.<sup>xviii</sup> Such waiver must be both knowing and intelligent.<sup>xix</sup> The authority of the person giving the consent may be one factor to consider.<sup>xx</sup>

**Inventory:** So long as the officer's department has a written policy providing for it, the officer may inventory the contents of a vehicle prior to it being impounded and towed for the purpose of safekeeping and avoiding claims of loss.<sup>xxi</sup> This exception has survived and been well-recognized following *Gant*.<sup>xxii</sup>

**Abandonment:** If vehicle has been abandoned, then privacy interests have also been abandoned and the officer is free to search the vehicle.<sup>xxiii</sup> Where a paper bag containing Oxycontin was found outside of car and had not been seen there immediately prior by officer, coupled with the passenger's denial of ownership or knowledge of bag, a search and seizure of the drugs was permissible.<sup>xxiv</sup>

**Plain View:** So long as the officer is in a position in which he is lawfully entitled to be, anything plainly visible to him falls under this well-established exception.<sup>xxv</sup>

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When an officer lawfully observed the presence of a rifle in plain view inside a vehicle, probable cause to believe the vehicle contained contraband allowed the vehicle to be searched without a warrant.<sup>xxvi</sup>

## Conclusion

*Arizona v Gant*, while perhaps defining limits surrounding searches incident to an arrest of an occupant of a motor vehicle, permits those searches under better defined and reasonable circumstances. In its aftermath, *Gant* has had little, if any, effect on otherwise permissible and long-recognized exceptions to the search warrant requirement. Regardless, law enforcement officers and prosecutors should always expressly and thoroughly articulate the reasons for any warrantless search.

- <sup>i</sup> *Arizona v Gant*, 556 U.S. 332 (2009)
- <sup>ii</sup> *New York v Belton*, 453 U.S. 454 (1981)
- <sup>iii</sup> W. Stoughton, *Modern Police Practices: Arizona v. Gant's Illusory Restriction of Vehicle Searches Incident to Arrest*, 97 Va. L. Rev. 1727 (2011)
- <sup>iv</sup> *United States v McCraney*, 674 F.3d 614 (6<sup>th</sup> Cir. 2012) Occupants of vehicle not handcuffed or secured in the back of a patrol car, but standing behind rear bumper with three officers standing around them while two other officers searched the vehicle.
- <sup>v</sup> *State v Mbacke*, 721 S.E.2d 218, 222 (N.C. 2012), citing *Terry v Ohio*, 392 U.S. 1 (1968)
- <sup>vi</sup> *Michigan v Tavernier*, No. 302678 (Mich. App. 2012)
- <sup>vii</sup> *State v Brown*, Appellate Case No. 2010-175826, Opinion No. 27207 (S.C. 2012) Search of duffel bag held to be illegal as search incident to arrest for open container violation.
- <sup>viii</sup> Stoughton, *supra*
- <sup>ix</sup> See, e.g., *US v Steele*, 353 Fed Appx 908 (5<sup>th</sup> Cir. 2009)
- <sup>x</sup> *United States v Claude X*, 648 F.3d 599 \*8<sup>th</sup> Cir. 2011)
- <sup>xi</sup> *Michigan v Long*, U.S. 1032 (1983)
- <sup>xii</sup> *People v Washington*, No. 291217 (Mich. App. 2010); *State v Ellison*, No. 41945-9-11 (Wash. App. 2013)
- <sup>xiii</sup> *United States v Ross*, 456 U.S. 798 (1982)
- <sup>xiv</sup> *United States v Steele*, 353 Fed. Appx. 908 (5<sup>th</sup> Cir 2009)
- <sup>xv</sup> *People v Howard*, No. 295018 (Mich. App. 2010)
- <sup>xvi</sup> *United States v Conerly*, 2010 WL 3641237 (E.D. Mich 2010)
- <sup>xvii</sup> *Maryland v Buie*, 494 U.S. 325 (1990)
- <sup>xviii</sup> See *Schneekloth v. Bustamonte*, 412 U. S. 218 (1973)
- <sup>xix</sup> *Schneekloth v. Bustamonte*, *supra*
- <sup>xx</sup> *People v Gouch*, No. 299706 (Mich. App. 2011)
- <sup>xxi</sup> *South Dakota v. Opperman*, 428 U.S. 364 (1976)
- <sup>xxii</sup> *United States v Clinton*, 591 F.3d 968, 972 (7<sup>th</sup> Cir. 2010)
- <sup>xxiii</sup> *California v. Greenwald*, 486 U.S. 35 (1988)
- <sup>xxiv</sup> *People v Gouch*, *supra*
- <sup>xxv</sup> *Coolidge v. New Hampshire*, 403 U.S. 443 (1971)
- <sup>xxvi</sup> *People v Jackson*, 2012 WL 1320117 (Mich. App. 2012) (No. 303127)



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