

The Supremes Sing “Stop! (Searching Vehicles Incident to Arrest) In The Name Of Love”:

Arizona v. Gant¹

Legal Question of The Week

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We pause this week to mourn the passing of a law enforcement tool that has been celebrated for 28 long years. This faithful friend has helped us make the streets safer, take guns and drugs away from the bad guys, and do our jobs in an efficient and easy to understand way. Much has been taught and written about this technique over the past three decades that will now have to be entirely forgotten and corrected. We now lay to rest the right to search vehicles incident to arrest.²

As with any tragedy, questions abound in our grief. Why did he have to leave us so soon? Why didn't we appreciate him more when he was here? What can we do now? How do we go on from here? How can there be self-help groups? And who made that long distance call to Denver on my phone? This legal update will attempt to answer some of these questions to help you cope in the days and weeks to come. But first, let us celebrate the life of this doctrine with a brief look back at the history of searching vehicles incident to arrest.

In 1969, the Supreme Court held in Chimel v. California,³ that when an officer lawfully arrests a suspect, the officer has the right to search the suspect incident to that arrest. The Court found two justifications for this type of search: (1) to protect the officer from any weapon that might be accessible to the suspect, and (2) to prevent the suspect from destroying evidence. In addition to searching the arrestee's person, Chimel gave police permission to search the area within the arrestee's immediate control at the time he was arrested. Chimel is still good law.⁴

¹ ___ U.S. ___ (No. 07-542, April 21, 2009).

² There may be a little life left in this doctrine as you will hopefully read later in this update. There are still limited situations where I believe searching a vehicle incident to arrest can be done. But that doesn't fit into my melodramatic metaphor, so play along for now.

³ 395 U.S. 752 (1969). The Supremes (the group, not the Court) had the last number one hit of 1969 (and therefore, of the 60s) with “Someday, We'll Be Together.” Diana Ross left the group the next year.

⁴ Subject to later rulings by the Court, of course. I have little doubt you will always have the right to search an arrestee's person after a legal arrest, but one of the questions that is raised by the Gant decision is how it

In 1981, New York v. Belton⁵ was decided by the Supreme Court. In this case, the Court applied the ruling in Chimel to vehicle stops by holding that when an officer arrests the occupant of a motor vehicle, the officer may search the entire passenger compartment of the vehicle, including any containers inside the vehicle incident to the arrest.⁶ In doing so, they relied on the same justifications that they had put forth in Chimel, namely the safety issue and the issue of preventing destruction of evidence. This case is all but overruled by the Gant case.⁷

Finally, in Thornton v. U.S.,⁸ the Court extended the Belton rule to allow for the search of a vehicle upon the arrest of a person who had exited the vehicle and started walking away from it shortly before being arrested. This case is also a casualty of the Gant decision.⁹

In this week's case, Arizona v. Gant, the police had received reports of drug activity at a particular residence. They went to the residence and made contact with Mr. Gant, who indicated that the owner of the residence was not there and would be back later. The police returned later, having run Mr. Gant's record and found that his driver's license was revoked. As they were watching the house, Mr. Gant drove up, parked, and exited his vehicle. Officers arrested Mr. Gant for driving with a revoked license, handcuffed him, and placed him in a patrol car. They then conducted a search of the vehicle incident to his arrest where they found a bag of cocaine in the pocket of a jacket on the backseat.¹⁰

might apply to searching the immediate area of an arrestee in non-vehicle situations, for example, an arrest made in the suspect's house. More on this later.

⁵ 453 U.S. 454 (1981). Diana Ross had the number two song of 1981 with "Endless Love," a duet she sang with Lionel Richie. You youngsters will be interested to know that Lionel Richie is the father of Nicole Richie of "The Simple Life" fame. Like vehicle searches incident to arrest, Nicole Richie is not of much use to anybody.

⁶ This is what is known in legal circles as a "bright-line rule" which is a clearly defined rule composed of objective factors which leaves little room for varying interpretation. Officers like bright-line rules because they are easy to understand and apply. Defense lawyers do not like bright-line rules because the easier things are to understand, the less need there is for lawyers.

⁷ Belton would still control if a situation arose today with the same facts. In Belton, an officer with one set of handcuffs and no backup arrested several suspects during a roadside stop – in this situation, you would still be justified in performing a search of the vehicle incident to arrest.

⁸ 541 U.S. 615 (2004). According to Wikipedia, Diana Ross had a successful tour in Europe in 2004. "The Supremes" was the title of an episode of *The West Wing* in 2004 in which a Supreme Court Justice dies and has to be replaced by the President, played by Martin Sheen. The episode is silent as to the nominee's views on searches incident to arrest.

⁹ My good friend and fellow law enforcement attorney Ralph Strickland wrote a fine legal update on the Thornton case back in 2004 and an even finer legal update on the Belton case in 2003. Both are currently found on the webpage of Smith, Rodgers, & Strickland (www.policehelp.net). Both will be taken down very soon because they are now worthless scraps of paper. You may also mark through most of pages 90 and 91 of Bob Farb's Arrest, Search, and Investigation (Third Edition, 2003).

¹⁰ When asked at the suppression hearing why they searched the car, the officer said, "Because the law says we can do it." This was a perfectly acceptable and correct answer at the time.

In a stunning 5 to 4 decision, the Supreme Court reversed the conviction obtained in this case and ruled that searching a vehicle incident to arrest when the arrestee was secured safely away from the vehicle was unconstitutional under the Fourth Amendment to the U.S. Constitution.

From now on, an officer may NOT search a vehicle incident to the arrest of an occupant
UNLESS:

1. The arrestee is unsecured and within reaching distance of the passenger compartment at the time the search is conducted.

OR

2. The officer reasonably believes that he/she will find evidence in the vehicle which is relevant to the crime for which the occupant is being arrested.

Ok – let’s take some questions from the audience.

QUESTION: Why?! Why, oh why?!

Logically, the Justices in the majority opinion pointed out that there is little danger of the vehicle occupant getting back into the car and getting a weapon or destroying evidence when he is safely tucked away in handcuffs in the back seat of a patrol car. Since that was the justification for searches incident to arrest, they concluded that this kind of search gave “police officers unbridled discretion to rummage at will among a person’s private effects.”

QUESTION: Well, why don’t I just leave the arrestee unsecured (but closely watched) and close to the vehicle while I search?

While this is the obvious loophole we find in the Court’s opinion, it is probably not a good idea for a couple of reasons. First, there are some fairly significant risks to your safety connected with doing a search incident to arrest in this manner. Second, the Court is already a step ahead of you. In a footnote¹¹ to the Court’s opinion, Justice Stevens writes:

“Because officers have many means of ensuring the safe arrest of vehicle occupants, it will be the rare case in which an officer is unable to fully effectuate an arrest so that a real possibility of access to the arrestee’s vehicle remains.”

The “courts” (from the U.S. Supreme all the way down to your local District Court) generally do not take kindly to officers using cute tricks like this to circumvent the Constitution.¹² I imagine that most judges would find a search done in this manner to be

¹¹ Who uses footnotes anymore? Really.

¹² However, defense attorneys can do this at will.

unconstitutional and suppress any evidence that is discovered as a result. In other words, you cannot create your own exigent circumstances.

QUESTION: Who won the March Madness bracket challenge this year?

Hypothetically speaking, if I were to have entered such a contest at the hypothetical police department this year, I suppose that it would have hypothetically been won by ME. In fact, I imagine that I hypothetically won by correctly picking the NATIONAL CHAMPION NORTH CAROLINA TARHEELS to defeat the Michigan State Whatever's in the finals. In theory, of course.

QUESTION: What the *\$^@ is “reasonable belief” as in “the officer reasonably believes that he/she will find evidence in the vehicle?”

If you look at the ruling of the Court in Gant (see box above), you notice that an officer MAY search a vehicle incident to arrest IF the officer reasonably believes that he/she will find evidence in the vehicle which is relevant to the crime for which the occupant is being arrested. Which raises the obvious question – what is the “reasonable belief” standard? Is it probable cause? Is it reasonable suspicion? Or is it something else?

The answer: I don't know.

I'm in good company on this, however. In a dissenting opinion, Justice Alito points out that this new rule is given by the Court “without any independent explanation of its origin or justification and is virtually certain to confuse law enforcement officers and judges for some time to come.” Generally, when the courts talk about “reasonable grounds” they mean probable cause. But officers may already search based on probable cause that evidence of ANY crime is present, so it makes no sense to limit that somehow to only evidence of the crime for which the arrest was made.

On the other hand, the court usually uses the phrase “reasonable and articulable suspicion” when talking about the reasonable suspicion standard. So this new standard is going to have to be defined or clarified in subsequent decisions.

QUESTION: How does this ruling affect searches incident to arrest in other situations?

As of right now, the Gant case only affects vehicle searches done incident to arrest. However, you can be sure that there will be a case in the future that asks the court to apply the reasoning in Gant to searches done incident to arrest in homes or other buildings. For instance, let's say that you arrest someone in their home, handcuff them, and take them outside. Current law would indicate that you can then search the immediate area in which the arrest was made incident to that arrest. It is hard to imagine that this type of search incident to arrest would be justifiable in light of the Gant ruling.

Once the arrestee is safely secured, the officer safety and evidence preservation rationales have vanished.¹³

On the other hand, if the arrestee is handcuffed but the search of his immediate area is done incident to arrest before he is removed from the scene, the Court might distinguish the Gant case and rule that the search was constitutional.

QUESTION: How can Time Warner suddenly start charging me based on how much I use the internet instead of a set fee for unlimited access?

Time Warner Cable is a monopoly for all intents and purposes in providing internet service in this area. That means two things: (1) They own all the properties of one color and can now start purchasing houses and hotels, and (2) They have the power to do whatever they want to extract as much money as they want from as many people as they want.

QUESTION: Are there any situations where I can conduct a vehicle search incident to arrest of an occupant?

Yes, but these situations are very limited. If you have a situation where you are truly unable to secure the arrestee safely,¹⁴ the officer safety and evidence preservation concerns would still exist and give you a proper reason to do a vehicle search incident to arrest.

I believe that you are also justified in searching a vehicle incident to the arrest of an occupant in situations where another occupant or the original driver is not placed under arrest and is going to be allowed to get back into the vehicle and leave. The argument for the search incident to arrest in this situation would be that the “companions” of the arrestee might be upset that you are arresting him or may be co-conspirators in whatever crime the arrest stemmed from. Therefore, the officer safety and evidence preservation rationale might apply.

BUT USE THIS ADVICE WITH CAUTION. This is an untested legal theory on my part and the courts could very well disagree with me and suppress the kilo of crack cocaine you just recovered.

QUESTION: What are my other options for searching a vehicle?

(1) Inventory search. If you decide to seize the vehicle or have the vehicle

¹³ This hypothetical assumes there is no one else in the house when the arrest is made. If other people are present who might present a danger to the officer who just arrested their buddy, I believe the Court would uphold the need to do a search incident to arrest of the immediate area. This is speculation on my part, however, and won't be clear until a case like that is decided.

¹⁴ For example, you have two people under arrest and one set of handcuffs, you lost your handcuffs, some other officer took your handcuffs and engraved his own initials onto them, or you left your handcuffs attached to the bedpost. Something like that.

towed¹⁵ or impounded, you may conduct an inventory search of the vehicle's contents. You MAY NOT do a search incident to arrest and simply call it an inventory search. You MUST follow the reasonable standardized policy of the Department which also sets out the scope of such a search.¹⁶

- (2) Warrantless Search based on Probable Cause. If you have probable cause to believe there is evidence in the vehicle, you do not need a warrant because of the "vehicle exception."
- (3) Consent. 'nuff said.
- (4) "Automobile Frisk." If you have reasonable suspicion that the driver or passenger is dangerous and may gain immediate control of a weapon, you may search the passenger area and any unlocked containers for a weapon. You may NOT look in the trunk.

For a more in depth look at these, go back and read my legal update from last year on vehicle searches, which is still correct except for anything having to do with searches incident to arrest.¹⁷

QUESTION: What will happen to my pending cases where I made charges after searching a vehicle incident to arrest?

Unfortunately, unless you had another justification for the search of the vehicle, any evidence discovered during the search and as a result of the search is going to be suppressed. Because this is a ruling concerning a Constitutional right, the fact that you had every reason to believe that what you were doing at the time was legal doesn't matter. It was a violation of the Fourth Amendment.

QUESTION: After eating, do amphibians have to wait one hour before getting out of the water?

Um...okay. I think that's all the time we have this week. Have a great weekend.

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¹⁵ Brandon Barber calls this "The towing company stimulus package." Pretty witty for a housing authority officer.

¹⁶ High Point Police Department General Order 2.13(F). You may search the passenger area, the trunk, and open any locked containers for which the key is present. In fact, you must search the entire vehicle, including the trunk, because that's what our policy states.

¹⁷ I'm going back to edit it now.