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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



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FILED: 06-08-2010  
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STATE OF ARIZONA, ) 1 CA-CR 09-0591  
)  
Appellant, ) DEPARTMENT B  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication - Rule  
DONALD EUGENE REED, JR., ) 111, Rules of the Arizona  
) Supreme Court)  
Appellee. )  
)

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Appeal from the Superior Court in Maricopa County

Cause No. CR 2008-181406-001 DT

The Honorable Timothy J. Ryan, Judge

**VACATED AND REMANDED**

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**N O R R I S**, Judge

¶1 The State of Arizona timely appeals from an order granting Donald Eugene Reed Jr.'s motion to suppress evidence. As we explain below, because the superior court did not address

the State's arguments regarding two exceptions to the warrant requirement, we vacate the court's order granting the motion to suppress and remand for further proceedings consistent with this decision.<sup>1</sup>

#### **FACTS AND PROCEDURAL BACKGROUND<sup>2</sup>**

¶12 A grand jury indicted Reed on one count of sale or transportation of narcotic drugs ("crack" cocaine), one count of possession or use of dangerous drugs (methamphetamine) and one count of possession or use of marijuana. Reed moved to suppress "all evidence" seized following a traffic stop in which police recovered "crack" cocaine, methamphetamine, and marijuana from his car.

¶13 At the suppression hearing, Officer A. testified he pulled Reed over for speeding. As the officer approached Reed's car, the "window was rolled down [and] [w]hen I contacted him I could smell an odor of marijuana emitting from inside the

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<sup>1</sup>The superior court also granted Reed's motion to suppress statements. On appeal, the State has not challenged the court's ruling on this motion.

<sup>2</sup>"In reviewing a trial court's decision on a motion to suppress, we view the facts in the light most favorable to upholding the trial court's ruling and consider only the evidence presented at the suppression hearing." *State v. Teagle*, 217 Ariz. 17, 20, ¶ 2, 170 P.3d 266, 269 (App. 2007). We review the superior court's factual findings on a motion to suppress evidence for abuse of discretion, but review de novo its ultimate legal determination the search complied with the requirements of the Fourth Amendment. *In re Tiffany O.*, 217 Ariz. 370, 373, ¶ 9, 174 P.3d 282, 285 (App. 2007).

vehicle." The officer also testified Reed had "red, watery, bloodshot eyes, and when he was looking for his driver's license he was fumbling through the wallet and having difficulty with his dexterity and faculties, and appearing to be very nervous."

¶14 Officer A. stated he "pulled" Reed out of the car to "detain[] [him] for a DUI investigation" and saw, from outside the car, "a plastic baggie with a rock substance that appeared to be rock cocaine" located in the "center console cupholder between the two front seats." Officer A. handcuffed Reed, placed Reed in his patrol car, removed the plastic baggie, and had Reed's car towed to a nearby convenience store. At this convenience store parking lot, while other officers investigated Reed for DUI, Officer A. searched Reed's car, performed a field test of the cocaine-like substance, and determined it was cocaine.<sup>3</sup> Officer A. found two pill bottles, one containing what he believed to be ecstasy and the other containing what he believed to be "meth" in a covered part of the center console, and marijuana in the trunk.

¶15 Relying on *Arizona v. Gant*, \_\_\_ U.S. \_\_\_, \_\_\_, 129 S. Ct. 1710, 1723, 173 L. Ed. 2d 485 (2009), the superior court determined "there was no longer an issue of officer safety, and . . . no longer an issue of concealment, destruction, or

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<sup>3</sup>It is not clear from the record whether the officer field tested the cocaine-like substance before or after searching Reed's car.

spoliation of evidence in the Defendant's vehicle" and granted Reed's motion.

## DISCUSSION

### *I. Offense of Arrest Exception*

¶16 Also relying on *Gant*, the State first asserts the superior court did not address its argument Officer A. had a reasonable belief Reed's car contained evidence of his offense of arrest, and thus argues we should reverse the court's ruling. Because we agree with the State, we vacate and remand to the court for consideration of this argument.

¶17 The State may not conduct "unreasonable searches and seizures." U.S. Const. amend. IV. Warrantless searches and seizures are per se unreasonable unless a recognized exception to the warrant requirement exists. *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 514, 19 L. Ed. 2d 576 (1967). One such exception is the search incident to arrest, which permits police to search within an arrestee's "immediate control," meaning "the area from within which [the arrestee] might gain possession of a weapon or destructible evidence.'" *Gant*, \_\_\_ U.S. at \_\_\_, 129 S. Ct. at 1714 (quoting *Chimel v. California*, 395 U.S. 752, 763, 89 S. Ct. 2034, 2040, 23 L. Ed. 2d 685 (1969)). *Gant* explained this "officer safety" or "evidence preservation" exception does not "authorize a vehicle search incident to a recent occupant's arrest after the arrestee has

been secured and cannot access the interior of the vehicle.” *Id.* at \_\_\_, \_\_\_, 129 S. Ct. at 1714, 1716. *Gant* also recognized an “offense of arrest” exception, where “circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle.” *Id.* at \_\_\_, 129 S. Ct. at 1714.

¶18 Here, based on the evidence presented at the suppression hearing, the superior court correctly concluded Officer A.’s search of Reed’s car was not authorized under *Gant*’s officer safety or evidence preservation exception. The court did not, however, address the State’s argument “the search actually d[id] relate to the cause for arrest,” and thus, the search was permissible under *Gant*’s offense of arrest exception. Because the court did not address the State’s argument the search was authorized under that exception, we remand to the superior court to consider whether Officer A.’s search of Reed’s car was permissible on that basis. We decline to decide whether, based on the evidence presented at the suppression hearing, Officer A.’s search was justified by this exception. The superior court is in the best position to determine the credibility of witnesses.<sup>4</sup> See, e.g., *State v. Ossana*, 199 Ariz.

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<sup>4</sup>The superior court found Officer A.’s testimony unreliable on an issue unrelated to this appeal, but

459, 461, ¶ 7, 18 P.3d 1258, 1260 (App. 2001) (superior court determines the credibility of witnesses). On remand, the court may exercise its discretion to consider the applicability of the offense of arrest exception based on the existing record or as supplemented by the parties.

## *II. Automobile Exception*

¶19 Also on appeal, as it did in the superior court, the State argues Officer A.'s search was authorized under another exception to the warrant requirement, the "automobile exception." See *State v. Reyna*, 205 Ariz. 374, 375, ¶ 5, 71 P.3d 366, 367 (App. 2003) (citing *California v. Carney*, 471 U.S. 386, 390, 392-93, 105 S. Ct. 2066, 2068, 2070, 85 L. Ed. 2d 406 (1985)). This exception permits a warrantless search when probable cause exists "to search a readily mobile vehicle that is stopped on the roadway or parked on a public street or in a parking lot." *Id.*<sup>5</sup> The superior court did not address this argument in granting the motion to suppress. Thus, on remand,

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contemporaneous with Reed's traffic stop. See *supra* note 1. Although the superior court made no such finding concerning Officer A.'s memory of the traffic stop and recovery/testing of the contraband, the record demonstrates conflicts between his recollection of events and his police report.

<sup>5</sup>In *Reyna*, we held police could conduct a warrantless search following a traffic stop of a truck when the officer "smelled the odor of marijuana coming from a support column in the bed of the truck" and "noticed that a compartment area had been welded to the truck, making its contents inaccessible." 205 Ariz. at 374-75, ¶ 2, 378, ¶ 16, 71 P.3d at 366-67, 370.

the superior court may also evaluate the reasonableness of the search under the automobile exception.

**CONCLUSION**

¶10 For the foregoing reasons, we vacate the superior court's order granting Reed's motion to suppress evidence and remand for further proceedings consistent with this decision.

/s/

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PATRICIA K. NORRIS, Judge

CONCURRING:

/s/

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JOHN C. GEMMILL, Presiding Judge

/s/

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MAURICE PORTLEY, Judge