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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



DIVISION ONE  
FILED: 04/12/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: sls

STATE OF ARIZONA, ) 1 CA-CR 11-0292  
)  
Appellee, ) DEPARTMENT B  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
GERALD ALLEN WILSON, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellant. )  
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-132574-002DT

The Honorable Joseph C. Welty, Judge

**AFFIRMED**

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Thomas C. Horne, Attorney General Phoenix  
By Kent E. Cattani, Division Chief Counsel  
Joseph T. Maziarz, Section Chief Counsel  
and Angela Kebric, Assistant Attorney General  
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix  
By Paul J. Prato, Deputy Public Defender  
Attorneys for Appellant

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W I N T H R O P, Chief Judge

¶1 Gerald Allen Wilson ("Appellant") appeals his six felony convictions. Appellant argues that the trial court erred in denying his motion to suppress evidence discovered from

searches of his car and residence. For the following reasons, we affirm.

#### FACTS AND PROCEDURAL HISTORY

¶2 On July 28, 2010, the State charged Appellant by information with seven felony counts: Count 1, possession of dangerous drugs for sale, a class two felony; Counts 2, 3, and 5, misconduct involving weapons, each a class four felony; Count 4, possession or use of dangerous drugs, a class four felony; and Counts 6 and 7, possession of drug paraphernalia, each a class six felony. The trial court granted the State's subsequent motion to dismiss Count 5 with prejudice.

¶3 Before trial, Appellant and his co-defendant, Christi Carter, filed motions to suppress. Appellant sought to suppress evidence related to the search of his automobile and residence. The trial court held a three-day evidentiary hearing on the motions to suppress. At the suppression hearing, the State presented the following testimony:<sup>1</sup> On June 22, 2010, an undercover Phoenix police detective was conducting surveillance

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<sup>1</sup> In reviewing the trial court's denial of a motion to suppress, we consider only the evidence presented at the suppression hearing, viewing it in the light most favorable to sustaining the ruling. *State v. Gay*, 214 Ariz. 214, 217, ¶ 4, 150 P.3d 787, 790 (App. 2007). Although not bound by the trial court's legal determinations, we generally defer to the court's factual findings, including determinations of witnesses' credibility. See *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996); *State v. Ossana*, 199 Ariz. 459, 461, ¶ 7, 18 P.3d 1258, 1260 (App. 2001).

of a residence suspected to be a "drug house."<sup>2</sup> While watching the residence, the detective observed a green Honda arrive and park in the driveway. The driver, Sherry Johnston, exited the car and entered the residence. The detective continued to observe people enter and exit the house. Shortly thereafter, the garage door opened, a purple Honda backed out of the garage, and someone drove Johnston's green Honda into the garage. Three people - Appellant, another male, and Johnston - entered the purple Honda and drove away. Appellant was the driver, and Johnston was a passenger in the backseat.

¶4 The detective followed the purple Honda and observed Appellant commit a traffic violation (speeding, at an alleged rate of sixty to sixty-three miles per hour in a forty-five mile-per-hour zone). The detective radioed a marked police unit to conduct a traffic stop of the purple Honda. After uniformed officers made the traffic stop, the detective parked his vehicle some distance away, put on a police vest, and walked to the location of the traffic stop.

¶5 The detective spoke to Appellant, who informed the detective that he was a "prohibited possessor," see Ariz. Rev.

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<sup>2</sup> The detective had received this information from another officer who had received an anonymous tip from a concerned citizen, and when the detective arrived at the location, he recognized the house as being the subject of a similar complaint several months earlier. He had not followed up on the initial tip due to a lack of time and resources.

Stat. ("A.R.S.") § 13-3101(A)(7) (West 2012),<sup>3</sup> and that there was a knife located in the vehicle. The detective asked if he could remove the knife, and Appellant consented, then exited the vehicle. As the detective retrieved the knife, he noticed two other weapons in the vehicle - an expandable baton and a stun gun.<sup>4</sup>

¶6 The detective asked the other two passengers, Henry R. and Johnston, to step out of the car, and they complied. Johnston was holding her purse, and the detective asked if he could search it. Johnston consented to the search, and the detective discovered a bag containing methamphetamine inside the purse. The detective placed Johnston under arrest.

¶7 The detective and another officer searched the vehicle for additional drugs, drug paraphernalia, and weapons. The other officer found what initially appeared to be a D-cell battery among "a bunch of clutter" in the "map pocket" of the driver's door, but closer inspection revealed that the "battery" was a container holding methamphetamine. The officers arrested Appellant and released Henry R.

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<sup>3</sup> We cite the current version of all statutes as they appear in Westlaw unless changes material to our analysis have since occurred.

<sup>4</sup> The detective stated that he did not arrest Appellant for misconduct involving weapons, see A.R.S. § 13-3102(A)(4), because he concluded that none of the weapons found in the vehicle was a "deadly weapon or prohibited weapon" within the meaning of the statute. See A.R.S. § 13-3101(A)(1), (8).

¶8 While at the traffic stop, the officers determined that the suspected "drug house" was Appellant's residence, and Appellant's girlfriend, Carter, was still at the house. The detective, accompanied by other officers, returned to Appellant's residence to continue the investigation. The detective knocked on the door of the residence, and Carter answered, but she did not consent to a search of the residence. Based on the officers' concern that she might attempt to retrieve a weapon or destroy evidence, Carter was handcuffed and detained while officers performed a protective sweep of the residence for safety purposes and in an effort to secure the house before a search warrant could be obtained.

¶9 After the officers completed the protective sweep, the detective returned to the police precinct to author an affidavit and prepare a search warrant. The other officers stayed at the house to ensure it remained secure. While the detective prepared the warrant, the officers at the residence informed Carter of her rights pursuant to *Miranda*,<sup>5</sup> and she agreed to speak with them.

¶10 During the discussion between Carter and the officers, Carter admitted using methamphetamine, and that methamphetamine and drug paraphernalia, including water bongs, were in the bedroom. Carter also stated that at least two guns were in the

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<sup>5</sup> See *Miranda v. Arizona*, 384 U.S. 436 (1966).

residence. The information provided by Carter was included in the application for the search warrant. Carter was arrested, and a search warrant of the home was obtained and executed.

¶11 In the couple's bedroom, officers found methamphetamine; several weapons, including guns; and drug paraphernalia, including pipes, scales, and baggies. They also found a drug ledger detailing weights of drugs, dollar amounts, and names. Officers also discovered several swords and knives on the wall and around the headboard of the couple's bed, a monitor in the bedroom, and surveillance cameras outside the home. In the bathroom and on Appellant's computer desk, officers found several fake batteries similar to the one found in Appellant's vehicle.

¶12 The trial court denied the motions to suppress. Appellant and Carter were tried jointly. At the conclusion of the trial, the jury found Appellant guilty of the remaining six counts as charged, with the exception of Count 1, pursuant to which the jury found Appellant guilty of the lesser-included offense of possession of dangerous drugs, a class four felony.

¶13 Before sentencing, the trial court found that Appellant had at least two historical prior felony convictions. At sentencing, the court imposed the following terms of imprisonment: minimum terms of eight years each for Counts 1 and 4; mitigated terms of six years each for Counts 2 and 3; and

minimum terms of three years each for Counts 6 and 7. The court ordered that Counts 1, 4, 6, and 7 run concurrently with one another, and that Counts 2 and 3 be served concurrently, but be consecutive to Counts 1, 4, 6, and 7. The court also credited Appellant for twenty-two days of presentence incarceration, to be applied to Counts 1, 4, 6, and 7.

¶14 Appellant filed a timely notice of appeal from his convictions and sentences.<sup>6</sup> We have jurisdiction over his appeal pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

#### ANALYSIS

¶15 Appellant argues that the warrantless search of his vehicle (and consequently, the subsequent search of his residence, which resulted from a warrant based in part on information derived from the search of the vehicle) violated his constitutional rights prohibiting unreasonable searches and seizures. See U.S. Const. amend. IV, XIV, § 1; Ariz. Const. art. 2, § 8. In making his argument, Appellant maintains the trial court incorrectly articulated and applied the standard for warrantless searches as pronounced in *Arizona v. Gant*, 556 U.S. 332 (2009), and that the facts do not support the court's

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<sup>6</sup> Carter filed a separate appeal, and this court affirmed her convictions and sentences in a recent memorandum decision. See *State v. Carter*, 1 CA-CR 11-0273 (Ariz. App. Mar. 6, 2012).

conclusion that the search of his vehicle was consistent with *Gant*'s "reasonable to believe" standard.<sup>7</sup>

¶16 In general, we review a trial court's denial of a motion to suppress for an abuse of discretion. *State v. Dean*, 206 Ariz. 158, 161, ¶ 9, 76 P.3d 429, 432 (2003). In making our determination, however, we review the court's legal conclusions *de novo*. *State v. Blackmore*, 186 Ariz. 630, 632, 925 P.2d 1347, 1349 (1996).

¶17 In denying Appellant's motion to suppress, the trial court concluded that "the search [of Appellant's vehicle] was lawful as a search incident to the arrest of Ms. Johnston." The court based its conclusion on its finding that the State had satisfied the "reasonable to believe" standard articulated in *Gant*. In further explaining its reasoning, the court stated as follows:

*Gant* articulated a reason to believe standard. The holding in *Gant* ultimately is that the police may search a vehicle incident to a recent occupant's arrest, only if the arrestee is within a reaching distance of the passenger compartment at the time of the search, or it is reasonable to believe the vehicle contains evidence of the offense of arrest.

Factually, I do not find any of these three individuals was within reach of the passenger

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<sup>7</sup> In *Gant*, the United States Supreme Court concluded "that circumstances unique to the vehicle context justify a search incident to arrest when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" 556 U.S. at 343 (quoting *Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring)).



compartment at the time of the arrest. That is not the basis of my finding that it applies.

But what I do find, is that the reason to believe standard has been satisfied here. What the officers knew, based upon my factual findings in this case, was that Ms. Johnston had arrived at an area suspected of trafficking in drugs. That she had gone into the residence, that she had left the residence, that she was followed from the residence, that she was found in possession of methamphetamine in the back of a car that had just left the residence. That clearly while being stopped, could have disposed of some of the drugs present in her purse, within the passenger compartment of that vehicle, and that would not have been seen by the officers.

In addition, I believe that the finding of some weapons, though not prohibited weapons, and not the subject of an arrest, were relevant for the officers to believe that there was something within that car that required a weapon for either the protection of the . . . occupants, or for protection of drugs.

¶18 Appellant argues that the trial court incorrectly applied *Gant*'s "reasonable to believe" standard because the transcript of the proceedings in this case indicates the court referred to the standard as a "reason to believe" standard. We find no error in the standard applied by the trial court. The court's analysis makes clear that the court applied the correct standard, even if it apparently misspoke when enunciating the *Gant* phraseology. Further, in *United States v. Pruitt*, 458 F.3d 477 (6th Cir. 2006), the Sixth Circuit Court of Appeals held that the "reasonable belief standard" is a "lesser" standard than probable cause, and that "[r]easonable belief is established by looking at common sense factors and evaluating

the totality of the circumstances." *Id.* at 482 (citations omitted). Later, in *United States v. Reagan*, 713 F. Supp. 2d 724 (E.D. Tenn. 2010), the federal district court, relying in part on *Pruitt*, stated that it was "unable to perceive any meaningful difference between the phrases 'reasonable belief' and 'reasonable to believe'" and concluded that the standards should be construed as "functional equivalent[s]." *Id.* at 728. The court interpreted *Gant* to mean that "incident to the lawful arrest of the occupant of a vehicle, law enforcement officers may search the passenger compartment of that vehicle and any containers therein without a warrant when . . . it is reasonable to believe, based upon common sense factors and the totality of the circumstances, that evidence of the offense of the arrest is inside." *Id.* See also *State v. Cantrell*, 233 P.3d 178, 183-85 (Idaho Ct. App. 2010) (discussing the "reasonable to believe" standard and distinguishing it from the probable cause standard). The trial court's oral analysis and case law subsequent to *Gant* support the conclusion that the court did not err in applying the *Gant* standard to Appellant's motion to suppress.

¶19 Further, facts presented at the suppression hearing support the trial court's conclusion that it was reasonable for the police officers to believe Appellant's vehicle contained evidence relevant to the offense of arrest (Johnston's arrest

for possession of methamphetamine). The police had received prior tips about suspected drug activity at Appellant's residence, Johnston had recently entered that residence before leaving with Appellant in his vehicle, the detective had already found several weapons in Appellant's vehicle, and the detective had found methamphetamine in Johnston's purse. These facts support the court's finding that the officers could have reasonably believed additional evidence related to Johnston's arrest might be found in the vehicle - including drug paraphernalia, drugs that Johnston might have hidden at the onset of the traffic stop, or additional weapons that might have been used to ensure her possession of the drugs. The facts support the conclusion that the search of Appellant's vehicle was a valid search incident to arrest because it was consistent with *Gant's* "reasonable to believe" standard, and the trial court did not abuse its discretion in denying Appellant's motion to suppress evidence obtained from the search of his vehicle.

¶20 Because we find that the trial court did not abuse its discretion in denying Appellant's motion to suppress evidence obtained from the search of his vehicle, we also find no basis for applying the "fruit of the poisonous tree" doctrine to the subsequent search of Appellant's residence. See *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963). The search warrant obtained for the search of Appellant's residence was based on

probable cause supported by evidence that was legally obtained. Accordingly, the evidence seized pursuant to the search of the residence was admissible.

**CONCLUSION**

¶21 The trial court did not err in applying the *Gant* standard or abuse its discretion in denying Appellant's motion to suppress evidence obtained from searches of his vehicle and residence. Appellant's convictions are affirmed.

\_\_\_\_\_/S/\_\_\_\_\_  
LAWRENCE F. WINTHROP, Chief Judge

CONCURRING:

\_\_\_\_\_/S/\_\_\_\_\_  
DIANE M. JOHNSEN, Presiding Judge

\_\_\_\_\_/S/\_\_\_\_\_  
PETER B. SWANN, Judge