DIVISION ONE
FILED: 07-13-2010
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 09-0517
	)	
Appellant,	)	DEPARTMENT C
	)	
v.	)	**MEMORANDUM DECISION**
	)	
DAMON TROY GAMBOA,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellee.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-180555-001 DT

The Honorable Cari A. Harrison, Judge

REVERSED AND REMANDED

Richard M. Romley, Maricopa County Attorney — Phoenix
By Arthur Hazelton, Deputy County Attorney
Attorneys for Appellant

James J. Haas, Maricopa County Public Defender — Phoenix
By Peg Green, Deputy Public Defender
Attorneys for Appellee

K E S S L E R, Judge

¶1 The State appeals from the superior court's grant of a motion to suppress alleged drug paraphernalia seized during a warrantless search of a vehicle driven by Damon Troy Gamboa ("Defendant"). For the reasons that follow, we conclude the

trial court erred in finding the search was unreasonable under *Gant v. Arizona*, 129 S.Ct. 1710 (2009). We therefore reverse and remand for further proceedings consistent with this decision.

BACKGROUND

¶2 In reviewing a motion to suppress, "we will not disturb [a superior court's] ruling absent clear and manifest error." *State v. Hyde*, 186 Ariz. 252, 265, 921 P.2d 655, 668 (1996) (citations omitted). We review a trial court's determinations of probable cause and reasonable suspicion *de novo*. *Ornelas v. United States,* 517 U.S. 690, 699 (1996); *see also State v. Olm,* 223 Ariz. 429, ¶¶ 7, 9, 224 P.3d 245, 248 (App. 2010).

¶3 The suppression hearing revealed the following uncontested facts. *State v. Wyman,* 197 Ariz. 10, 12, ¶ 2, 3 P.3d 392, 394 (App. 2000) ("[W]e review only the evidence presented at the suppression hearing."). On December 27, 2008, Phoenix police officer B.T. and his partner F.C. were on routine patrol in a fully-marked patrol car when they observed a "clear . . . baggie-like object" thrown from the driver's side window of the vehicle in front of them. The officers initiated a traffic stop. A third officer retrieved the thrown item and informed Officers B.T. and F.C. that it was a plastic baggie containing what was possibly marijuana. Accordingly, Officer

B.T. arrested Defendant, the vehicle's driver, handcuffed him and placed him in the back seat of the patrol car. Without obtaining a warrant, Officer F.C. searched the vehicle Defendant was driving and seized a packet of "Zig-Zag" papers from the center console.[1]

¶4 The State charged Defendant with one count of possession or use of marijuana, a class six felony and, based on the rolling papers, one count of possession of drug paraphernalia, also a class six felony. Seeking to exclude the rolling papers, Defendant filed a motion to suppress. Relying on *Gant*, Defendant argued that the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement did not apply here because Defendant was secured in the patrol car and "the officers had no reason to believe that evidence relevant to the crime of arrest might be present in the vehicle." In response, the State argued that Defendant's arrest for marijuana possession distinguished his vehicle search from the unconstitutional search in *Gant* where the defendant was arrested for driving on a suspended license, evidence of which the searching officers could not reasonably believe existed in the defendant's vehicle.

[1] The vehicle's passenger was not arrested; he apparently sat on the curb between the two vehicles during the search.

¶5 The superior court held a suppression hearing and granted the motion to suppress finding "under the *Gant* case . . . the search was unreasonable as the police could not reasonably have believed either that [Defendant] could have accessed his car at the time of the search or that evidence of the offense for which he was arrested might have been found therein." Upon the State's subsequent motion, the court dismissed the case without prejudice. The State timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003) and 13-4032(6) (2010).[2]

DISCUSSION

¶6 In *Gant,* the United States Supreme Court addressed the propriety of a warrantless vehicle search conducted incident to the arrest of a recent occupant. In that case, police arrested Gant for driving without a license, handcuffed him, and locked him in a patrol car. 129 S.Ct. at 1714. Relying on *New York v. Belton,* 453 U.S. 454 (1981), officers searched Gant's car and discovered cocaine in a jacket on the backseat. *Id.* A broad reading of *Belton* would have permitted police officers to conduct warrantless, protective searches of vehicles even after the arrestee was fully under control. *See Gant,* 129 S.Ct. at

[2] We cite to a statute's current version when no revisions material to our decision have occurred since the date of the offense.

1719. The Court in *Gant,* however, concluded that the search of Gant's vehicle was unreasonable. *Id*. at 1719. The Court first held that a search incident to arrest cannot be justified on police safety when the defendant has been arrested and is not sufficiently near the vehicle to pose a danger to police. *Id.* at 1719. The court then explained that in vehicle searches incident to arrest, the nature of the offense may, in some cases, provide a reasonable belief that evidence of the crime for which the defendant was arrested is in the vehicle:

> In many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence. *See, e.g., Atwater v. Lago Vista,* 532 U.S. 318, 324 . . .; *Knowles v. Iowa*, 525 U.S. 113, 118 . . . . But in others, including [*New York v.*] *Belton* [453 U.S. 454 (1981)] and *Thornton* [*v. United States*, 541 U.S. 615 (2004)], the offense of arrest will supply a basis for searching the passenger compartment of the arrestee's vehicle and any containers therein.

129 S.Ct. at 1719. The Court then concluded that

> [p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within 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*.

Id. at 1723 (emphasis added).

¶7 The first test of a valid *Gant* search is not at issue here. Defendant was undisputedly restrained in the patrol car,

and therefore not in close proximity to his vehicle's passenger compartment. Rather, it is the second test that we must address: Did Officer F.C. reasonably believe Defendant's vehicle contained evidence of his arrest?

¶8 The Court's language in *Gant* on the reasonable belief based second test has led to different interpretations. One line of cases has concluded that *Gant* means that except in driving and traffic types of offenses, when a person is arrested in a vehicle and removed from the vehicle, the police have reasonable cause to search the vehicle for further evidence of the crime for which he was arrested. *E.g., Brown v. State*, 24 So.3d 671, 677-79 (Fla. App. 2009); *People v. Osborne*, 175 Cal. App. 4th 1052, 1065 (2009).[3]

¶9 A second line of cases refuses to read *Gant* as providing a per se test for reasonable basis to search the vehicle depending solely on the nature of the offense for which the defendant was arrested. *E.g., United States v. Reagan*, No. 3:10-22, 2010 WL 2010898 at *3-7 (E.D. Tenn. May 19, 2010). The approach in *Reagan* is that "reasonable belief" is the same as "reason to believe" and requires a court to determine, based on common sense and the totality of the circumstances whether the

[3] Of the cases cited in *Gant*, 129 S.Ct. at 1719, both *Belton* and *Thornton* involved arrests for possession of drugs. In *Gant* the Court found the offense did not provide a basis for the search because the arrest was traffic-related. *Atwater* and *Knowles* also involved traffic-related arrests followed by searches.

police had cause to believe there would be evidence of the offense of the arrest in the vehicle. *Id.* at *3 (citation omitted). The reasoning of *Reagan* is that there are conceptual difficulties in categorizing crimes as to whether it is the type of crime for which it is reasonable to believe evidence of the crime will be in the car and a piecemeal approach to categorizing will lead to inconsistent decisions. *Id.* at *6. *Reagan* also reasoned that application of a per se rule might lead to unreasonable or unintended results by allowing police to search a vehicle incident to arrest when it is wholly unreasonable to believe evidence of the offense is inside. *Id*. at *7. Thus, one could imagine a defendant being arrested on an outstanding warrant for theft of a means of transportation several years earlier and the police trying to justify a search of the vehicle he was driving when arrested for evidence of that old, unrelated crime. [4]

[4] Another concern with the per se test is the language of *Gant* itself. One would assume that if the Court meant that reasonable belief would arise simply from the nature of the offense, it would have said so. While we could read the language quoted above from *Gant* in that way, that would not explain why Justice Scalia in his concurrence as the fifth vote in *Gant* wrote: "I would hold that a vehicle search incident to arrest is *ipso facto* `reasonable' only when the object of the search is evidence of the crime for which the arrest was made, or of another crime that the officer has probable cause to believe occurred." 129 S.Ct. at 1725. One would think that if that was what the Court meant, the majority would have incorporated Justice Scalia's sentence in the opinion, but it did not do so. While trying to parse the language of *Gant* may be analogous to

¶10 A third group of cases appears to give lip service to the reasonable belief on the nature of the offense theory, but seem to rely on other evidence being present to justify the search. *United States v. Page*, 679 F.Supp.2d 648, 654 (E.D. Va. 2009) (seizure of drugs from the person of the defendant after he was stopped in the vehicle justified search of vehicle for drugs); *Hill v. State*, 303 S.W.3d 863, 875-76 (Tex. App. 2009) (drugs in plain view in vehicle justified search); *State v. Snapp*, 219 P.3d 971, 976-77 (Wash. App. 2009) (drugs in plain view and defendant's movements to hide something in car gave police reasonable belief to search for drugs in vehicle).

¶11 We need not decide how to interpret the reasonable basis language in *Gant* to resolve this case. For resolution of this case, we agree with those courts which have held that when illegal drugs or other contraband are found in plain view in a vehicle (or seen being thrown from the vehicle) and the occupant is arrested for crimes related to such contraband, under the totality of the circumstances test the police could have reasonable suspicion to believe that other evidence related to that crime is in the vehicle sufficient to search the passenger

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divining the future based on examining the entrails of dead birds, we are not alone in trying to determine what the reasonable basis test really means. *See Gant*, 129 S.Ct. at 1731 (Alito, J., dissenting) (stating the lack of clarity in the reasonable basis test) and *Meggisson v. United States*, 129 S.Ct. 1982 (2009) (Alito, J., dissenting) (same).

compartment for such evidence incident to the arrest. This is the narrowest reading of *Gant* on the reasonable belief test and is also consistent with *Reagan* on the totality of the circumstances/common sense test. We leave resolution of the issue whether there is a per se reasonable belief based simply on the nature of the offense to another day.

¶12 Here, Defendant was arrested because police officers observed a baggie of marijuana tossed out of the driver's side window of the vehicle Defendant was driving. It was undisputed that the baggie appeared to contain marijuana and the police arrested Defendant for possession of marijuana immediately prior to the search. Officer F.C. stated he searched the vehicle for more marijuana and under the totality of the circumstances test it was reasonable to believe that additional marijuana or paraphernalia could remain in that vehicle immediately after the arrest.

CONCLUSION

¶13 For the foregoing reasons, we reverse the superior court's order granting the motion to suppress. The matter is remanded for further proceedings consistent with this decision.

/S/
DONN KESSLER, Judge

CONCURRING:

/S/
MARGARET H. DOWNIE, Presiding Judge

/S/
PETER B. SWANN, Judge