

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MICHAEL WILLIAM MUNGO,

Defendant-Appellee.

FOR PUBLICATION

April 13, 2010

9:10 a.m.

No. 269250

Washtenaw Circuit Court

LC No. 05-001221-FH

ON REMAND

Before: WHITBECK, P.J., and TALBOT and ZAHRA, JJ.

ZAHRA, J.

The prosecutor appeals as of right the circuit court's order granting defendant's motion to suppress evidence and quash the information. Previously, this Court reversed the circuit court's order, holding that "a police officer may search a car incident to a passenger's arrest where before the search there was no probable cause to believe that the car contained contraband or that the driver and owner of the car had engaged in any unlawful activity." *People v Mungo*, 277 Mich App 577, 578; 747 NW2d 875 (2008). Following this Court's decision, defendant appealed to our Supreme Court, which held the application for leave to appeal in abeyance pending release of the United States Supreme Court decision in *Arizona v Gant*, 556 US ___, 129 S Ct 1710; 173 L Ed 2d 485 (2009). On April 21, 2009, the United States Supreme Court issued an opinion in *Gant*, which held that a vehicle may *not* be searched "incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle." *Id.* at 1714. Consequently, our Supreme Court has vacated this Court's decision in *Mungo* and remanded for reconsideration in light of *Gant*. *People v Mungo*, 483 Mich 1091 (2009). On remand, we affirm the circuit court's order suppressing evidence and quashing the Information.

I. BASIC FACTS AND PROCEDURE

As stated in this Court's previous opinion:

Washtenaw County Sheriff's Deputy Ryan Stuck lawfully initiated a traffic stop of a car driven by defendant. Mark Dixon was the sole passenger in the car. Upon request, defendant produced the vehicle registration and proof of insurance. Deputy Stuck also requested the occupants' driver's licenses and ran

Law Enforcement Information Network (LEIN) checks on both Dixon and defendant. Deputy Stuck found that Dixon had two outstanding warrants issued for failing to appear in court to answer traffic-violation charges. Deputy Stuck arrested Dixon, asked his dispatcher to send another officer to assist him, and secured Dixon in the back of his squad car. Deputy Stuck directed defendant to step out of his car and conducted a pat-down search. Thereafter, Deputy Stuck searched defendant's car and found an unloaded gun in a case underneath the driver's seat and ammunition in the glove compartment. Deputy Stuck asked defendant to produce a permit to carry a concealed weapon. However, defendant produced only a permit to purchase a firearm. Defendant's LEIN check did not reveal that he had been issued a concealed-weapons permit. Deputy Stuck arrested defendant for unlawfully carrying a concealed weapon.

In the circuit court, defendant moved to quash the information and suppress evidence of the gun. The prosecutor relied on [*Belton*] to argue that the arrest of any person in a car justifies a search of the passenger compartment of that car. The prosecutor argued that the search that led to the discovery of the gun was constitutionally permissible because Dixon, a passenger in defendant's car, was lawfully arrested. Defendant relied on [*Missouri*] v *Bradshaw*, 99 SW3d 73 (Mo App, 2003), a case in which a divided panel of the Missouri Court of Appeals distinguished *Belton* and held that police officers cannot lawfully search a driver's vehicle following the arrest of a passenger where the passenger was safely arrested and there was no reasonable suspicion that the driver possessed unlawful items.

The circuit court distinguished *Belton* and followed *Bradshaw*. The circuit court concluded that defendant was not under arrest at the time Deputy Stuck searched his car. The circuit court further concluded that defendant had a protected privacy interest in his car. The circuit court held that there was no probable cause to arrest defendant and, therefore, the search of his car was not constitutionally permissible. This appeal followed. [*Mungo*, 277 Mich App at 578-580 (footnote omitted).]

II. ANALYSIS

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision to dismiss a charge on legal grounds. *People v Owen*, 251 Mich App 76, 78; 649 NW2d 777 (2002). This Court reviews a trial court's findings of fact for clear error. MCR 2.613(C).

B. APPLICATION OF *GANT V ARIZONA*

In *Gant*, 129 S Ct at 1714-1715, two persons were arrested outside a residence at which narcotics allegedly were sold. These persons were secured in separate police cars. Defendant Gant, who had been at the residence earlier, arrived in his vehicle and was arrested for driving with a suspended license after he had exited the vehicle and walked some 10 to 12 feet. An additional patrol car arrived, and Gant was secured in the back of that car. Two officers searched

Gant's car and found a gun and a bag of cocaine. Ultimately, the Arizona Supreme Court held that the search of Gant's car was unreasonable under the Fourth Amendment to the United States Constitution, US Const, Am IV. *Gant*, 129 S Ct at 1715.

The United States Supreme Court in *Gant* revisited the issue of what circumstances permit a police officer to search the passenger compartment of a vehicle incident to a recent occupant's arrest. *Id.* at 1716. The *Gant* Court began its analysis by noting that generally warrantless searches are per se unreasonable under the Fourth Amendment. One exception to this general rule is that a search may be permissible if it is incident to a lawful arrest. That exception "derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations." *Id.* A search incident to arrest may include only the person of the arrestee and the area within the immediate control of the arrestee, i.e., the area in which the arrestee might gain a weapon or evidence that could be destroyed. *Id.*, citing *Chimel v California*, 395 US 752, 763; 89 S Ct 2034; 23 L Ed 2d 685 (1969). The *Gant* Court explained that in *New York v Belton*, 453 US 454; 101 S Ct 2860; 69 L Ed 2d 768 (1981), the Supreme Court considered the application of the *Chimel* rule in the context of a vehicle search. The Supreme Court held that if an officer lawfully arrests "the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of the automobile and any containers therein." *Gant*, 129 S Ct at 1717, quoting *Belton*, 453 US at 460.

The Supreme Court observed that the decision in *Belton* "has been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search." *Gant*, 129 S Ct at 1718. The Supreme Court continued:

Under this broad reading of *Belton*, a vehicle search would be authorized incident to every arrest of a recent occupant notwithstanding that in most cases the vehicle's passenger compartment will not be within the arrestee's reach at the time of the search. To read *Belton* as authorizing a vehicle search incident to every recent occupant's arrest would thus untether the rule from the justifications underlying the *Chimel* exception—a result clearly incompatible with our statement in *Belton* that it "in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests." 453 U.S. at 460, n 3, 101 S. Ct. 2860, 69 L. Ed. 2d 768. Accordingly, we reject this reading of *Belton* and hold that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.

Although it does not follow from *Chimel*, we also conclude that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *Thornton [v United States]*, 541 US 615, 632;] 124 S Ct 2127[;] 158 L Ed 2d 905 [(2004)], (SCALIA, J., concurring in judgment.) 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, 121 S. Ct. 1536, 149 L. Ed. 2d 549 (2001); *Knowles v Iowa*, 525 U.S. 113, 118; 119 S. Ct. 484, 142 L. Ed. 2d 492

(1998). But in others, including *Belton* and *Thornton*, the offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein. [*Gant*, 129 S Ct at 1719.]

The Supreme Court concluded that “[n]either the possibility of access nor the likelihood of discovering offense-related evidence authorized the search in this case.” *Id.* The Supreme Court noted that unlike in *Belton*, where a single police officer had to deal with four unsecured arrestees, in *Gant*, five officers were present to deal with three arrestees, all of whom were secured in police vehicles before the search of *Gant*'s car occurred. Thus, *Gant* could not reach into the passenger compartment of his vehicle at the time the vehicle was searched. Furthermore, unlike in *Thornton*, where the defendant was arrested for a narcotics offense, *Gant* was arrested for driving with a suspended license. The police could not expect to find evidence of that offense from a search of *Gant*'s car. The *Gant* Court determined that “[b]ecause police could not reasonably have believed that *Gant* 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, the search in this case was unreasonable.” *Id.*

The Supreme Court concluded:

Police 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. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies. The Arizona Supreme Court correctly held that this case involved an unreasonable search. Accordingly, the judgment of the State Supreme Court is affirmed. [*Id.* at 1723-1724.]

Applying *Gant* to the facts presented in this case, we conclude that the search of defendant's vehicle incident to the arrest of Dixon was illegal and that the trial court correctly granted defendant's motion to suppress the evidence and quash the information.

Deputy Stuck placed Dixon under arrest after discovering that Dixon had two outstanding warrants for traffic violations. The officer secured Dixon in the back of the police vehicle. The officer searched the vehicle only after an additional police unit had arrived and defendant had been secured in the back of that police vehicle. Defendant was not under arrest at the time the search occurred, and Deputy Stuck searched defendant's vehicle incident to Dixon's arrest. Neither defendant nor Dixon would have been able to reach into the passenger compartment of defendant's vehicle when the search occurred; thus, concern for officer safety was not at issue. See *Gant*, 129 S Ct at 1716. Further, because Dixon was placed under arrest for traffic violations, there would have been no reasonable basis for the officer to conclude that evidence of those offenses could be found in a search of defendant's vehicle. See *id.* at 1719; *Thornton*, 541 US at 632. Thus, we conclude that Deputy Stuck's warrantless search of defendant's car was unreasonable and in violation of the Fourth Amendment. See *Gant*, 129 S Ct at 1723-1724.

C. THE EXCLUSIONARY RULE AND THE RETROACTIVITY DOCTRINE

This Court *sua sponte* issued an order directing the parties to file supplemental briefs addressing application of the good faith exception to the exclusionary rule, see *United States v Leon*, 468 US 897; 104 S Ct 3405; 82 L Ed 2d 677 (1984); *People v Goldston*, 470 Mich 523; 682 NW2d 479 (2004), and the retroactivity doctrine, see *Griffith v Kentucky*, 479 US 314, 328; 107 S Ct 708; 93 L Ed 2d 649 (1987); *People v Bell (On Second Remand)*, 264 Mich App 58; 689 NW2d 732 (2004). Defendant ignored this Court's directive. Plaintiff filed a brief acknowledging that *Gant* must be applied retroactively in the instant case. Nonetheless, plaintiff advocated for reversal of the lower court's order of suppression under the good faith exception to the exclusionary rule. We conclude that the search at issue in this case does not fall within the good faith exception to the exclusionary rule. Defendant is entitled to have the rule of law established in *Gant* applied to this case.

The judicially-created exclusionary rule operates to preclude from use at trial evidence obtained in violation of the Fourth Amendment. *Leon*, 468 US at 906. The purpose of the exclusionary rule is to deter police misconduct. *Id.* In *Leon*, the United States Supreme Court established a good-faith exception to the exclusionary rule, noting that application of the exclusionary rule requires weighing the benefits of the resulting deterrence of police misconduct against the costs incurred by preventing the introduction of otherwise valid evidence. *Id.* at 906-907. The *Leon* Court concluded that circumstances could exist in which these costs could outweigh any slight benefits gained by application of the exclusionary rule. For example, if a law enforcement officer acted in good faith and in an objectively reasonable manner on a search warrant later found to be defective due to judicial error, excluding the evidence obtained in the search would not operate to deter police misconduct. *Id.* at 920-921. The *Leon* Court concluded that the exclusionary rule should be applied on a case-by-case basis, and only if application would deter police misconduct. *Id.* at 918.¹

The retroactivity doctrine provides that “a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a ‘clear break’ with the past.” *Griffith*, 479 US at 328. The interaction between the good faith exception to the exclusionary rule and the retroactivity doctrine has been addressed by a number of federal courts. Diverse opinions have emerged in the federal courts in regard to the interaction and application of these two legal concepts.

In *United States v Buford*, 623 F Supp 2d 923 (MD Tenn, 2009), a case decided after the United States Supreme Court's decision in *Gant*, the United States District Court for the Middle

¹ In *People v Goldston*, 470 Mich 523; 682 NW2d 479 (2004), our Supreme Court adopted the good-faith exception to the exclusionary rule in Michigan. Const 1963, art 1, § 11. The *Goldston* Court held that the exclusionary rule should be applied on a case-by-case basis, and only in circumstances where exclusion of evidence would serve to deter police misconduct that occurs during search or seizure or in the preparation of an affidavit. *Goldston*, 470 Mich at 541-543.

District of Tennessee addressed application of the good faith exception to the exclusionary rule in a case factually similar to the instant case. The *Buford* court concluded that while there is tension between the policies supporting the exclusionary rule and the retroactivity doctrine, the retroactivity doctrine required rejection of the good faith exception to the exclusionary rule in that case:

[A]n extension of the “good faith” exception would lead to perverse results. For instance, under the [prosecution]’s argument, there is no basis for distinguishing the petitioner in the “new rule” case from similarly situated defendants whose cases were proceedings when the new rule was announced. That is, from the [prosecution]’s view of the “good faith” exception, there is no distinction between Gant and the defendant here, because both arresting officers were operating in a *Belton* world. Under the [prosecution]’s argument, then, Gant himself would only be entitled to the rather hollow relief of knowing that the search he was subjected to was a violation of his constitutional rights; that is, he would not be entitled to suppression of the evidence because the evidence was obtained in good faith reliance on *Belton*. Anyone similarly situated to Gant (such as the defendant) who was unfortunate enough to be arrested *pre-Gant* would likewise receive the same hollow relief. Anyone similarly situated to Gant, however, who was arrested subsequent to the *Gant* decision would be entitled to suppression of the evidence because the *Gant* decision would eliminate the good faith requirement. Therefore, the individual (Gant) who successfully convinced the Court that his Fourth Amendment rights had been violated would run the risk of criminal penalty, while subsequent defendants might go free, despite being subject to identical intrusions on privacy. Indeed, discussing a defendant similarly situated to the one in this case, one court noted, “[t]o say that an exception exists under the *Leon* rule to the application of [a] United States Supreme Court[] holding . . . which would permit the principle of the [] holding to be ignored [in a case subsequent to the holding] . . . to Defendant’s prejudice, creates logical and rational anomalies in implementation of Fourth Amendment doctrine of a decidedly perverse effect.” *U.S. v Holmes*, 175 F. Supp. 2d 62 n. 6 (D. Me. 2001) (noting the conundrum but not resolving the issue). [*Buford*, 623 F Supp 2d at 926-927.]

The *Buford* court rejected the prosecution’s contention that its interpretation of the law eliminated the good faith doctrine, noting that the cases that articulated the doctrine had not “gone so far as to extend the doctrine to reliance on decisions of the United States Supreme Court that were reversed or overturned while the defendant’s case was on review.” *Id.* at 927. The *Buford* court suppressed the evidence obtained in the search of the defendant’s vehicle. *Id.*

A contrary result was reached in *United States v Grote*, 629 F Supp 2d 1201 (ED Wa, 2009) (*Grote I*), where the United States District Court for the Eastern District of Washington rejected the defendant’s assertion that application of the good-faith exception violated the retroactivity doctrine set out in *Griffith* and relied on by *Buford*. In its order denying reconsideration, the Court stated:

This court understands the importance of the retroactivity doctrine in insuring that similarly situated criminal defendants are treated the same. In this

court's view, however, the good faith exception to the exclusionary rule is of equal importance. The exclusionary rule is intended to deter future police misconduct, not to cure past violations of a defendant's rights. Future police misconduct is not deterred when, as here, the officer did not engage in any misconduct and did not make a mistake of fact or law, but acted in objective good faith on the search incident to arrest law as it existed at the time, and had existed for many years. There is no deterrent effect to be gained by applying the exclusionary rule in this case. [*United States v Grote*, ___ F Supp 2d ___ (ED Wa, 2009) (*Grote II*).]

Similarly in *United States v McCane*, 573 F3d 1037, 1045 (CA 10, 2009), decided July 28, 2009, the United States Court of Appeals for the Tenth Circuit found that, in light of *Gant*, the district court erred in concluding that the search of the defendant's vehicle was valid, but affirmed the district court's denial of the defendant's motion to suppress based on the good-faith exception to the exclusionary rule. The *McCane* court noted that Tenth Circuit pre-*Gant* precedent supported the search of the defendant's vehicle. *Id.* at 1044-1045. The *McCane* court held that the district court properly denied the defendant's motion to suppress the evidence. *Id.* at 1040, 1045. In so doing, the court concluded that application of the retroactivity doctrine did not preclude application of the good faith exception to the exclusionary rule:

McCane argues that the retroactivity rule announced in *Griffith v. Kentucky*, 479 U.S. 314, 322-23, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987), requires application of the Supreme Court's holding in *Gant* to this case. The issue before us, however, is not whether the Court's ruling in *Gant* applies to this case, it is instead a question of the proper remedy upon application of *Gant* to this case. In *Leon*, the Supreme Court considered the tension between the retroactive application of Fourth Amendment decisions to pending cases and the good-faith exception to the exclusionary rule, stating that retroactivity in this context "has been assessed largely in terms of the contribution retroactivity might make to the deterrence of police misconduct." 468 US at 897, 912-13. The lack of deterrence likely to result from excluding evidence from searches done in good-faith reliance upon settled circuit precedent indicates the good-faith exception should apply in this context. *See Krull*, 480 U.S. at 360 (declining to apply a court decision declaring a statute unconstitutional to a case pending at the time the decision was rendered and instead applying the good-faith exception to the exclusionary rule because the officer reasonably relied upon the statute in conducting the search). [*McCane*, 573 F3d at 1044 n 5.]

Further, in *United States v Lopez*, 567 F3d 755, 757-758 (CA 6, 2009) (*Lopez I*), the United States Court of Appeals for the Sixth Circuit reversed and remanded the defendant's conviction in light of *Gant*, notwithstanding its finding that the search was permitted under the *Belton* standard. On remand, the prosecution asserted that "the exclusionary rule should not apply to the questioned evidence in this case because the search of [the defendant's] car was conducted 'in good faith reliance on *Belton* and its progeny.'" *United States v Lopez*, 655 F Supp 2d 720, 728 (ED Ky, 2009) (*Lopez II*). The United States District Court for the Eastern District of Kentucky noted that *Gant* did not address "the consequences of its holding regarding searches conducted incident to lawful arrests in reliance on *Belton* and subsequent decisions

applying *Belton*.” *Id.* at 725. The district court also noted that the Sixth Circuit court did not “reverse the judgment of conviction with instructions that the charges be dismissed. Instead, it stated that, ‘[t]he judgment of the district court is reversed *and remanded for further proceedings consistent with this opinion*.’” *Id.* at 727-728 (emphasis in *Lopez II*). The district court thus concluded that the Sixth Circuit court’s “opinion did not restrict this [c]ourt from considering whether the good faith exception to the exclusionary rule applies to the facts presented.” *Id.* at 732.

The district court then conducted a hearing in regard to whether the police officer acted in good faith in conducting the search of the defendant’s car. *United States v Lopez*, ___ F Supp 2d at ___ n 1 (ED Ky, 2009) (*Lopez III*). The district court observed, “Like its sister circuits prior to *Gant*, the Sixth Circuit recognized as lawful under *Belton* searches of vehicles conducted incident to an arrest even in circumstances where the arrestee did not have access to the passenger compartment of his car.” *Id.* at ___, citing *United States v White*, 871 F2d 41, 44 (CA 6, 1989) and *United States v Martin*, 289 F3d 392 (CA 6, 2002).²

The *Lopez III* court then concluded:

Here, the arrest was proper and the officer conducted the search in accordance with existing case law from this circuit. There is absolutely no evidence (or even argument) that the officer conducting the search was reckless in any way. While police conducting searches incident to arrests will likely change following *Gant*, the officer conducting the search of Lopez’s vehicle acted appropriately at that time. In short, a reasonably well-trained officer would not have known or concluded that the search was “illegal” in light of all the circumstances presented. [*Lopez III*, ___ F Supp 2d at ____.]

Preliminarily, we reject the notion expressed in *Buford*, that the retroactivity doctrine precludes application of the good faith exception to the exclusionary rule. As stated in *Grote II*, ___ F Supp 2d at ___, these two legal principles are of equal importance. Further, each principle presents constitutional concerns distinct from the other. As recently stated, “there is a clear dichotomy between Fourth Amendment violation and remedy, the retroactive application of *Gant* here to conclude that there was a violation does not inevitably lead to the conclusion that the good-faith exception cannot be considered to determine the appropriate remedy.” *People v Key*, ___ P3d ___ (Colo App, 2010).

We conclude that the retroactivity doctrine requires that *Gant* be applied to the instant case. The search at issue in the present case violated the Fourth Amendment and was unconstitutional. Having made this determination, our next inquiry is whether the evidence obtained as a result of the unconstitutional search should be suppressed. It is in this context that we examine the good faith exception to the exclusionary rule.

² The district court also cited several cases not selected for publication.

Whether reliance on case law can form a basis to invoke the good faith exception to the exclusionary rule is a significant legal question. The United States Supreme Court is silent on this issue. The Sixth Circuit and Tenth Circuit federal courts of appeal have expanded the good faith exception to apply to a law enforcement officer's reliance on case law. In *McCane* and similarly in *Lopez*, however, it was the clear and established law of the circuit that law enforcement officers were vested with the right to search a vehicle incident to a recent occupant's arrest. *McCane*, 573 F3d at 1041-1042 (citing several Tenth Circuit opinions upholding searches without regard to the nature of the offense and where the defendant was already restrained); *Lopez III*, ___ F Supp 2d at ___ ("Like its sister circuits prior to *Gant*, the Sixth Circuit recognized as lawful under *Belton* searches of vehicles conducted incident to an arrest even in circumstances where the arrestee did not have access to the passenger compartment of his car."). See also *Grote I*, 629 F Supp 2d at 1205 (noting that at the time the defendant's vehicle was searched it was "well accepted in the Ninth Circuit and elsewhere" that police could search a motor vehicle incident to a lawful arrest, "without regard to whether an arrestee was secured or unsecured, and without regard to whether evidence particular to the crime of arrest might be found in the vehicle.").

Assuming without deciding that reliance on Michigan case law can form a basis to invoke the good faith exception to the exclusionary rule, we conclude that the exception does not apply in the present case. Unlike *Lopez* and *McCane*, where the case law in each circuit was established and clear, the instant case represented the first published case in Michigan to address the applicability and extension of *Belton* to a vehicle search solely incident to a passenger's arrest. Indeed, this panel published our prior opinion in this matter because we concluded this issue presented a matter of first impression in Michigan. Given our conclusion that the law in this state on this point was not established and clear, the search and seizure of evidence from defendant's vehicle could not, as a matter of law, have been premised on law enforcement's good-faith reliance on case law. We therefore conclude that the good faith exception to the exclusionary rule has no application in the present case. Pursuant to the retroactivity doctrine, defendant is entitled to have the rule of law announced in *Gant* applied to this case.

III. CONCLUSION

We affirm the circuit court's order granting defendant's motion to suppress evidence and quash the Information.

/s/ Brian K. Zahra
/s/ William C. Whitbeck
/s/ Michael J. Talbot