[Cite as *State v. Winters*, 2010-Ohio-2678.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-G-2919**
- vs -	:	
NOAH S. WINTERS,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 08 C 000165.

Judgment: Affirmed.

David P. Joyce, Geauga County Prosecutor, and *Matthew J. Greenway*, Assistant Prosecutor, Courthouse Annex, 231 Main Street, Chardon, OH 44024 (For Plaintiff-Appellee).

R. Robert Umholtz, Geauga County Public Defender, 211 Main Street, Chardon, OH 44024 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Noah S. Winters, appeals his conviction of aggravated possession of drugs and the judgment of the Geauga County Court of Common Pleas denying his motion to suppress evidence. At issue is whether the search of appellant's wallet was lawful as a search incident to his arrest. For the reasons that follow, we affirm.

{¶2} On June 23, 2008, appellant was indicted for a violation of aggravated possession of drugs, in violation of R.C. 2925.11(A)(C)(1)(a), a felony of the fifth degree. He pled not guilty and filed a motion to suppress evidence.

{¶3} At the suppression hearing, the only evidence presented was the testimony of Special Agent Dennis Sweet of the Ohio Bureau of Criminal Identification and Investigation. His testimony was therefore undisputed. Agent Sweet has been a police officer for 14 years. For 12 years, he has been assigned to various task forces, including the Federal Organized Drug Enforcement Task Force in Cleveland.

{¶4} Agent Sweet testified that on June 23, 2008, he was assigned to assist the United States Marshall Service, Fugitive Task Force, in executing outstanding arrest warrants in Geauga County. On that date, he went to the Downing Manor Apartments in Chardon, Ohio to arrest appellant on a warrant based on his failure to pay child support. Appellant's family had reported that he was living there with his girlfriend.

{¶5} Upon arrival at appellant's apartment, Agent Sweet and two other officers knocked on the front door of the apartment numerous times and announced they were the police. Finally, appellant's girlfriend answered the door. The three officers entered the apartment. While Agent Sweet was in the doorway talking to appellant's girlfriend, he saw over her shoulder a male lying on a couch who matched appellant's description, fumbling on the couch with his hands in his pockets. As Agent Sweet described, "[h]e was rolling around, and so that was my first instinct that something wasn't right."

{¶6} Agent Sweet asked appellant's girlfriend to step out of the way. Appellant still had his hands in his pockets, and Agent Sweet told him to take his hands out of his pockets at least three times, but he did not respond. Appellant was lying on the couch

and he kept putting his hands behind him. The agent testified that, based on his training and experience, he felt threatened by appellant's refusal to respond to his instructions. He believed there was a risk appellant was armed with a gun or knife and that he "could get shot." Because he felt appellant presented a "threat of harm to [himself] or others," Agent Sweet drew his gun and pointed it at appellant and told him he was under arrest. In response, appellant stood up, reached in his pocket, pulled out his wallet, and dropped it on a coffee table immediately next to him. The wallet was a few inches from appellant's leg.

{¶7} While Agent Sweet held appellant at gunpoint, one of the other officers walked around Agent Sweet and handcuffed appellant behind his back. Immediately after he was handcuffed, Agent Sweet picked up appellant's wallet and searched it for appellant's identification. He also searched it for a weapon and drugs because, based on his experience, he believed these items would probably be in it. The agent said that after he saw the wallet in appellant's hand, he realized that was the item appellant had been digging for and was attempting to discard. Inside the wallet, Agent Sweet found appellant's identification, which verified they had the right person, and a small packet of methamphetamine, a Schedule II controlled substance.

{¶8} Agent Sweet testified that when he arrests someone on an outstanding warrant, usually everything on his person is placed in a plastic bag and taken to the jail. As a result, they would have taken appellant's wallet to the jail. The agent also testified that anything that goes into the jail is inventoried.

{¶9} The trial court denied appellant's motion to suppress, finding:

{¶10} "In this case the wallet had been on defendant's person during the arrest. It was within the reach-lunge-grab area at the time Mr. Winters was being cuffed, or contemporaneously thereto. There was a third party (defendant's girlfriend) whose intentions were not known in the immediate vicinity. The defendant removed the wallet from his pocket then abandoned it apparently in response to having a gun pointed at him. Law enforcement reasonably feared that a weapon could be in the wallet. In these circumstances this Court believes that the warrantless search incident to arrest exception applied."

{¶11} Thereafter, appellant pled no contest to the indictment, and he was found guilty. He was sentenced to two years of community control with the first six months in jail, and up to six months in the North East Ohio Community Alternative Program. The trial court stayed execution of the sentence pending appeal.

{¶12} Appellant appeals the trial court's denial of his motion to suppress, asserting the following as his sole assignment of error:

{¶13} "Appellant's constitutionally protected rights prohibiting warrantless searches were violated when the trial court denied his motion to suppress evidence which the trial court found to be justified under the search incident to arrest exception to the warrant requirement."

{¶14} "Appellate review of a trial court's ruling on a motion to suppress evidence presents a mixed question of law and fact." *State v. Lett*, 11th Dist. No. 2008-T-0116, 2009-Ohio-2796, at ¶13, citing *State v. Burnside*, 100 Ohio St.3d 152, 154, 2003-Ohio-5372. "During a hearing on a motion to suppress evidence, the trial judge acts as the trier of fact and, as such, is in the best position to resolve factual questions and assess

the credibility of witnesses. Id. at 154-155; *State v. Mills* (1992), 62 Ohio St.3d 357, 366." Id. An appellate court reviewing a motion to suppress is bound to accept the trial court's findings of fact where they are supported by competent, credible evidence. *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594. Accepting these facts as true, the appellate court independently reviews the trial court's legal determinations de novo. (Citation omitted.) *State v. Djisheff*, 11th Dist. No. 2005-T-0001, 2006-Ohio-6201, at ¶19.

{¶15} Under his assignment of error, appellant raises two issues. The first concerns the legality of the search of his wallet, and the second challenges the weight of the evidence. For his first issue, appellant argues that, because he was handcuffed prior to Agent Sweet's search of his wallet, that search was not justified under the search incident to arrest exception to the search warrant requirement, as construed by the United States Supreme Court in its recent ruling in *Arizona v. Gant* (2009), 129 S. Ct. 1710. The state counters that, because appellant was still within reach of his wallet even after he had been handcuffed, the search incident to arrest exception applies in this case.

{¶16} Before addressing the search incident to arrest exception, we shall consider whether Agent Sweet's search for appellant's identification in his wallet affected the legality of the search. First, we note that appellant did not challenge the validity of the arrest warrant in the trial court. Next, it is undisputed that Agent Sweet searched appellant's wallet at least in part for his identification because he did not know whether the person on the couch was the subject of the arrest warrant. The agent

testified that the identification he found in appellant's wallet verified that they had the right person.

{¶17} The facts of this case are similar to those in *United States v. Osborne*, (May 25, 2007), E.D. 10, No. 3:06-CR-110, 2007 U.S. Dist. LEXIS 38558, objection overruled at (July 2, 2007), E.D. 10, No. 3:06-CR-110, 2007 U.S. Dist. LEXIS 47870. In that case officers were called to the scene of "shots fired." The defendant was found in the vicinity by police, driving a car matching the description provided by dispatch. The officers handcuffed him for their safety. One of the officers conducted a sweep of the car for weapons, during which he went into the armrest compartment between the front seats and took the defendant's wallet containing his driver's license. After the officer took his license, he gave it to another officer, who called dispatch and learned there was an outstanding warrant for the defendant's arrest. The officers then arrested him and searched his car incident to that arrest, during which they found cocaine and two firearms. The defendant claimed the seizure of his wallet was unlawful because the officers lacked probable cause. He also claimed the wallet, plainly not being a threat to the officers' safety, should not have been seized and searched for his identification. Id. at *2-*6. In denying the defendant's motion to suppress, the court held:

{¶18} "The defendant Osborne's 'identity', even if obtained as a result of a search which went beyond the reasonable parameters of a protective sweep, cannot be suppressed. The defendant's identity is not evidence constituting a fruit of the poisonous tree. In short, the officers had a right to obtain the defendant's identity. *** Once the officers had the defendant's identity, a records check on the defendant

revealed an outstanding arrest warrant. Thus, the Court finds that the officers had probable cause to arrest the defendant." Id. at *16-*17.

{¶19} In support of its holding, the court in *Osborne* cited the Sixth Circuit case of *United States v. Navarro-Diaz*, 420 F.3d 581 (6th Cir. 2005), in which the court held that identity evidence is inherently different from other kinds of evidence, and that the identity of defendants is not suppressible under the exclusionary rule. Id. at 585-586. The court in *Navarro-Diaz* held that the defendant could not make a Fourth Amendment claim based on the officers' discovery of his identity. Id. at 586-587.

{¶20} In arriving at its decision, the Sixth Circuit cited two other cases, which addressed this issue. In the first case, *United States v. Arias* (C.A.4 1982), 678 F.2d 1202, 1203-1205, the Fourth Circuit was presented with a case in which the police stopped a van without reasonable suspicion; learned the identity of the occupants of the van; and then later connected the occupants to a crime in the area. The defendants moved to suppress their identities, claiming that the identity of the van's occupants would never have been discovered had the van not been stopped. Acknowledging that this may be true, the court held that the identity of the defendants is not suppressible under the exclusionary rule. Id. at 1206, citing *United States v. Crews* (1980), 445 U.S. 463. In *Crews*, the United States Supreme Court permitted a defendant to stand trial, although he was illegally arrested. The Court held that, although the exclusionary sanction applies to any fruits of a constitutional violation, a defendant is not himself a suppressible fruit. *Crews*, supra, 474. In the second case cited by the Sixth Circuit in *Navarro-Diaz*, supra, *United States v. Adegbite* (C.A.2 1988), 846 F.2d 834, the Second

Circuit also held that the identity of a defendant is not suppressible under the exclusionary rule. Id. at 838-839.

{¶21} Turning to the facts of the instant case, it is undisputed that Agent Sweet searched appellant's wallet at least in part to find his identification to verify he had arrested the correct person. Under cross-examination, the agent replied to a suggestion by defense counsel that he "knew who Mr. Winters was" when he saw him on the couch. Agent Sweet replied: "No. I indicated that I didn't know who he was on the couch. He matched the description of the guy that we were looking for."

{¶22} Appellant's identification was therefore not subject to suppression. Moreover, since Agent Sweet was entitled to search appellant's wallet for his identification, it follows that the narcotics also found by the police at the same time were not subject to exclusion under the plain view doctrine. Under this exception to the search warrant requirement, police may seize evidence in plain view during a lawful search if (1) the seizing officer is lawfully present at the place from which the evidence can be plainly viewed; (2) the seizing officer has a right of access to the object itself; and (3) the object's incriminating character is immediately apparent. *Horton v. California* (1990), 496 U.S. 128, 136-37.

{¶23} By our holding today, we do not imply that law enforcement can rifle through any citizen's wallet at any time on the pretext of searching for his identification, when his true intent is to search for evidence of a crime. Our holding is limited to the facts of this case where the officer was executing a lawful arrest warrant; the wallet is readily available under circumstances that make it clear the wallet belongs to appellant; the officer was uncertain as to whether appellant was the person named in the arrest

warrant; the search was conducted at least in part to obtain appellant's identification; and the search revealed his identification.

{¶24} Next, we consider whether appellant's wallet was admissible under the exception to the warrant requirement for evidence obtained during a search incident to a lawful arrest. In *Katz v. United States* (1967), 389 U.S. 347, the United States Supreme Court held that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment -- subject only to a few specifically established and well-delineated exceptions." Id. at 357.

{¶25} It is well settled that a search incident to a lawful arrest is a traditional exception to the warrant requirement. *Weeks v. United States* (1914), 232 U.S. 383, 392; *Chimel v. California* (1969), 395 U.S. 752, 755. In *Chimel*, the United States Supreme Court considered the permissible scope of a search incident to a lawful arrest under the Fourth Amendment. In that case three police officers came to the defendant's home with a warrant authorizing his arrest for burglary. When the defendant returned from work, the officers arrested him and asked for permission to "look around" his house. Although the defendant objected, the police conducted the search ostensibly on the basis of the petitioner's arrest. The officers looked through the entire house and had the defendant's wife open dresser drawers and move their contents. Police seized several items, which were subsequently used in his trial to convict him. Id. at *753. Finding the search to be unreasonable and overturning the defendant's conviction, the Court held:

{¶26} "*** When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control' -- construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." *Chimel*, supra, at 762-763.

{¶27} Thereafter, in *New York v. Belton* (1981), 453 U.S. 454, the Court applied the holding in *Chimel* to the automobile context. In *Belton*, a state trooper stopped an automobile for speeding. While attempting to determine the owner of the vehicle, the trooper smelled marihuana and saw on the floor of the car an envelope marked "Supergold," which the trooper associated with marihuana. He then directed each of the men in the vehicle to get out of the car and then arrested them for possession of marihuana. Without handcuffing the men, he split them up into four separate areas of the thruway so they would not be close enough to reach each other. The trooper searched each of the men. He then searched the passenger compartment of the car. In the back seat he found a leather jacket belonging to Belton. He unzipped one of its

pockets and discovered cocaine. Belton was charged with possession of cocaine and moved to suppress the evidence. In upholding the search, the Supreme Court held:

{¶28} "*** While the *Chimel* case established that a search incident to an arrest may not stray beyond the area within the immediate control of the arrestee, courts have found no workable definition of 'the area within the immediate control of the arrestee' when that area arguably includes the interior of an automobile and the arrestee is its recent occupant. Our reading of the cases suggests the generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary [item].' *** In order to establish the workable rule this category of cases requires, we read *Chimel*'s definition of the limits of the area that may be searched in light of that generalization. Accordingly, we hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, *** he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile. ***

{¶29} "It follows from this conclusion that the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach. *** Such a container may, of course, be searched whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have." (Footnotes and internal citations omitted.) *Belton*, supra, at 460-461.

{¶30} In April 2009, the United States Supreme Court revisited its holding in *Belton* in *Gant*, supra. In *Gant*, five police officers went to a residence on a tip that it was being used to sell drugs. The officers arrested and handcuffed two persons found at the residence and then placed them in separate cruisers. When Gant arrived at the house in his vehicle shortly thereafter, the officers arrested him for driving with a suspended license. Gant was handcuffed and locked in the back of another patrol car. The officers then searched his car and discovered cocaine in the pocket of a jacket on the backseat. Gant was charged with possession of narcotics and moved to suppress the evidence. The Supreme Court held:

{¶31} "In *Chimel*, we held that a search incident to arrest may only include 'the arrestee's person and the area "within his immediate control" -- construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.' Ibid. That limitation, which continues to define the boundaries of the exception, ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy. ***. If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply. ***

{¶32} "*** [In *Belton*] we held that when 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. *Belton*, 453 U.S., at 460 (footnote omitted). That holding was based in large part on our assumption

'that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within "the area into which an arrestee might reach."' *Ibid*.

{¶33} "***

{¶34} "*** [O]ur opinion [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. ***

{¶35} "***

{¶36} "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. 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. ***

{¶37} "***

{¶38} "Neither the possibility of access nor the likelihood of discovering offense-related evidence authorized the search in this case. Unlike in *Belton*, which involved a

single officer confronted with four unsecured arrestees, the five officers in this case outnumbered the three arrestees, all of whom had been handcuffed and secured in separate patrol cars before the officers searched Gant's car. Under those circumstances, Gant clearly was not within reaching distance of his car at the time of the search. An evidentiary basis for the search was also lacking in this case. Whereas Belton *** [was] arrested for drug offenses, Gant was arrested for driving with a suspended license -- an offense for which police could not expect to find evidence in the passenger compartment of Gant's car. ***. Because police could not reasonably have believed either 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." (Emphasis added, footnote omitted, and internal citations omitted.) *Gant*, supra, at 1717-1719.

{¶39} Unlike the facts in *Gant*, in the instant case, appellant engaged in a variety of furtive movements while on the couch. He also refused to comply with Agent Sweet's instructions to take his hands out of his pockets. Feeling threatened by appellant's failure to comply, Agent Sweet drew his gun and pointed it at him. Appellant then stood up and, in removing his hand from one pocket, took out his wallet and dropped it on a nearby coffee table. Agent Sweet testified that, based on his experience, he believed the wallet contained a weapon or narcotics.

{¶40} In a suppression hearing, we defer to the findings of fact made by the trial court. Here, the trial court, as the finder of fact, determined that the wallet in question was within the immediate reach of appellant. Agent Sweet testified that after fumbling with the wallet and dropping it, appellant stood up and the wallet was "inches from his

leg." Appellant was still present when the officer seized and searched the wallet. The trial court verified this with the following questioning of the officer:

{¶41} "THE COURT: Did you escort him away at that point?

{¶42} "MR. SWEET: No.

{¶43} "THE COURT: Who grabbed the wallet?

{¶44} "MR. SWEET: I picked the wallet up from the coffee table.

{¶45} "THE COURT: Is that when you looked in the wallet?

{¶46} "MR. SWEET: Yes.

{¶47} "THE COURT: Immediately after it was placed on the table?

{¶48} "MR. SWEET: Yes."

{¶49} There was thus competent, credible evidence to support the trial court's finding that appellant was within reaching distance of the wallet at the time of the search, thus satisfying the second prong of the *Gant* test.

{¶50} With respect to the first prong, i.e., whether the defendant was secured at the time, Gant was handcuffed and placed in a controlled environment—locked in the back of a patrol car—when the officers searched a jacket in his vehicle. Here, although appellant had been handcuffed, he was not taken away from the scene or placed in a cruiser. Instead, he was just inches away from the wallet when it was searched. Moreover, appellant's legs were free and he had the ability to turn and grab his wallet on the coffee table. As a result, there was competent, credible evidence that appellant was unsecured at the time of the search, thus satisfying the first prong of *Gant*.

{¶51} The instant case is strikingly similar to *State v. Combs*, 2d Dist. No. 22346, 2008-Ohio-2883, a case recently decided by the Second District, in which the court stated:

{¶52} "*** [W]e conclude that the search of the wallet was conducted incident to arrest. The wallet was found on the defendant when he was arrested. Officer Imwalle testified on cross examination that as the defendant was being removed to the cruiser he requested that the wallet go with him. Thus, the wallet was searched only after a short time span had elapsed between the arrest and the search. These facts fulfill both the proximity and contemporaneity requirements of a valid search incident to arrest. See *State v. Mathews* (1976), 46 Ohio St.2d 72." *Combs*, supra, at ¶4.

{¶53} In view of the foregoing, we hold the trial court did not err in finding that "the search incident to arrest exception under the circumstances of this case applies as it did before *Gant*."

{¶54} As a final note, regardless of whether *Gant* authorized a warrantless search incident to arrest under the circumstances of this case, the record here demonstrates that the narcotics would have been inevitably discovered as part of a routine inventory search or the booking process. "The ultimate or inevitable discovery exception to the Exclusionary Rule is hereby adopted so that illegally obtained evidence is properly admitted in a trial court proceeding once it is established that the evidence would have been ultimately or inevitably discovered during the course of a lawful investigation." *State v. Perkins* (1985), 18 Ohio St.3d 193, at syllabus.

{¶55} In *Illinois v. Lafayette* (1983), 462 U.S. 640, 641, the Supreme Court of the United States addressed the question of whether it was constitutionally permissible to

inventory the personal effects of a person arrested prior to incarceration without a warrant. The Court held such warrantless routine inventory process proper as an incident to booking and incarceration of the arrested person. The justification was determined to rest not on probable cause, but rather on consideration of orderly police administration. The Court held:

{¶56} "At the station house, it is entirely proper for police to remove and list or inventory property found on the person or in the possession of an arrested person who is to be jailed. A range of governmental interests supports an inventory process. It is not unheard of for persons employed in police activities to steal property taken from arrested persons; similarly, arrested persons have been known to make false claims regarding what was taken from their possession at the station house. A standardized procedure for making a list or inventory as soon as reasonable after reaching the station house not only deters false claims but also inhibits theft or careless handling of articles taken from the arrested person. Arrested persons have also been known to injure themselves—or others—with belts, knives, drugs, or other items on their person while being detained. Dangerous instrumentalities—such as razor blades, bombs, or weapons—can be concealed in innocent-looking articles taken from the arrestee's possession. The bare recital of these mundane realities justifies reasonable measures by police to limit these risks—either while the items are in police possession or at the time they are returned to the arrestee upon his release. Examining all the items removed from the arrestee's person or possession and listing or inventorying them is an entirely reasonable administrative procedure." Id. at 646.

{¶57} The touchstone for a reasonable inventory search is whether the search was conducted in good faith pursuant to standardized criteria or established routine. *United States v. Thompson* (C.A.2, 1994), 29 F.3d 62, 65; see, also, *United States v. Mendez* (C.A.2, 2002), 315 F.3d 132, 137. The inventory procedures need not be in writing, see id., and they need not be the least intrusive alternative. *Colorado v. Bertine* (1983), 479 U.S. 367, 374.

{¶58} We find the following holding of the Second District in *Combs*, supra, to be pertinent:

{¶59} "It is true that none of the officers testified at the suppression hearing to an explicit police procedure requiring an inventory search of an arrested person and attendant personalty. However, it is sufficiently clear that inventory searches of arrested persons and the personalty that they intend to bring with them into the county jail are a customary and typical procedure in Montgomery County. Furthermore, for obvious reasons of safety, the police are not obligated to return an item of personalty to a lawfully arrested individual sitting in a police cruiser without having first inspected it. *A wallet can hide any number of items that could be hazardous to police, such as a small pocket-knife or razor blade*. Finally, even had the search of the wallet been conducted at the county jail by jail employees, the search inevitably would have revealed that the wallet contained contraband. Thus, the search was a valid administrative inventory search pursuant to *Lafayette*[, supra]." (Emphasis added.) *Combs*, supra, at ¶6.

{¶60} In the instant case, Agent Sweet testified concerning police procedure, which would have required an inventory search of appellant's wallet at the jail. He testified as follows:

{¶61} "THE COURT: You arrest somebody on one of these sweeps?

{¶62} "MR. SWEET: Yes.

{¶63} "THE COURT: What usually happens with that person's wallet? Do you take it, do you leave it at the home, what do you do with it? Is there no practice or custom?

{¶64} "MR. SWEET: Usually everything in their possession is placed in a plastic bag and goes with them to jail because they might need their ID or whatever is in there.

{¶65} "THE COURT: Okay.

{¶66} "MR. SWEET: That's what usually happens.

{¶67} "THE COURT: Any reason why this case would have been treated differently?

{¶68} "MR. SWEET: Other than the fact that there were drugs found in the wallet?

{¶69} "THE COURT: Other than that.

{¶70} "MR. SWEET: No.

{¶71} "THE COURT: So it probably would have gone to jail?

{¶72} "MR. SWEET: Exactly.

{¶73} "THE COURT: Does it get searched at jail?

{¶74} "MR. SWEET: I believe anything going into the facility is searched."

{¶75} It is undisputed that the officers had probable cause to arrest the defendant pursuant to a valid arrest warrant so they were permitted to conduct an inventory search without a warrant. Further, Agent Sweet testified that, pursuant to police procedure, appellant's wallet would have been searched at the jail. Therefore,

there was competent, credible evidence that the contraband in appellant's wallet would have inevitably been discovered as part of an inventory search at the jail.

{¶76} For the second issue under his assignment of error, appellant argues the trial court's finding that "[l]aw enforcement reasonably feared that a weapon could be in the wallet" was against the manifest weight of the evidence.

{¶77} In determining whether the judgment is against the manifest weight of the evidence, the court, "reviewing the entire record, weighs the evidence and all reasonable inferences," and considers the credibility of the witnesses. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. (Citation omitted.) The court determines whether, in resolving conflicts in the evidence and deciding witness credibility, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered. Id. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the judgment. Id. Witness credibility rests solely with the finder of fact, and an appellate court is not permitted to substitute its judgment for that of the jury. *State v. Awan* (1986), 22 Ohio St.3d 120, 123. The jury is entitled to believe all, part, or none of the testimony of any witness. *State v. McDaniel*, 10th Dist. No. 06AP-44, 2006-Ohio-5298, at ¶3. The role of the reviewing court is to engage in a limited weighing of the evidence in determining whether the state properly carried its burden of persuasion. *Thompkins*, supra, at 387. "[I]f the evidence is susceptible to more than one interpretation, a reviewing court must interpret it in a manner consistent with the verdict." *State v. Banks*, 11th Dist. No. 2003-A-0118, 2005-Ohio-5286, at ¶33. (Citation omitted.)

{¶78} Appellant argues that because the incident report, which was prepared by another officer, who was not present at the scene, did not include certain details of Agent Sweet's testimony, the trial court's finding that law enforcement reasonably feared a weapon could be in the wallet was against the manifest weight of the evidence. However, as noted above, witness credibility rests solely with the finder of fact. It was, therefore, for the trial court to determine what effect, if any, the incident report had on the credibility of the agent. In light of the trial court's decision, it obviously had very little.

{¶79} Appellant next argues that if Agent Sweet truly believed appellant was trying to retrieve a weapon, the agent would have checked under the cushions of the couch. However, the agent testified that when he saw appellant holding his wallet, he realized that was the item appellant had been digging for. As a result, there was no reason for the agent to continue searching for the item in the couch since he believed—and reasonably so—that he had discovered what appellant had been trying to discard.

{¶80} Based upon our thorough and complete review of the record, we cannot say the trial court, in denying appellant's motion to suppress, clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed.

{¶81} For the reasons stated in the opinion of this court, the judgment of the Geauga County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J., concurs.

MARY JANE TRAPP, P.J., dissents with Dissenting Opinion.

MARY JANE TRAPP, J., dissents with Dissenting Opinion.

{¶82} Because I believe that *Gant*, supra, directly applies to the facts of this case, I respectfully dissent.

{¶83} The United States Supreme Court in *Gant* revisited and limited the search-incident-to-arrest exception to the warrant requirement. In arriving at its decision, the Court in *Gant* outlined the history of this exception. First, the Court considered the application of this exception in the context of a search in a defendant's home. The Court in *Gant* stated:

{¶84} "In *Chimel*, we held that a search incident to arrest may only include 'the arrestee's person and the area "within his immediate control" -- construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.' Ibid. That limitation, which continues to define the boundaries of the exception, ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy. See ibid. (noting that searches incident to arrest are reasonable '*in order to* remove any weapons [the arrestee] might seek to use' and '*in order to prevent* [the] concealment or destruction' of evidence). *** If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply. E.g., *Preston v. United States*, 376 U.S. 364, 367-368 (1964).

{¶85} "In *Belton*, we considered *Chimel's* application to the automobile context. A lone police officer in that case stopped a speeding car in which Belton was one of four

occupants. While asking for the driver's license and registration, the officer smelled burnt marijuana and observed an envelope on the car floor marked 'Supergold' -- a name he associated with marijuana. Thus having probable cause to believe the occupants had committed a drug offense, the officer ordered them out of the vehicle, placed them under arrest, and patted them down. Without handcuffing the arrestees, *** the officer '"split them up into four separate areas of the Thruway *** so they would not be in physical touching area of each other"' and searched the vehicle, including the pocket of a jacket on the backseat, in which he found cocaine. 453 U.S., at 456.

{¶86} "***

{¶87} "*** [W]e held that when 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. *Belton*, 453 U.S., at 460 (footnote omitted). That holding was based in large part on our assumption 'that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within "the area into which an arrestee might reach."' Ibid.

{¶88} "***

{¶89} "*** [O]ur opinion [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. ***

{¶90} "***

{¶91} "Under this broad reading of *Belton*, [supra,] 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." (Footnotes omitted and emphasis added by United States Supreme Court.) *Gant*, supra, at 1716-1719.

{¶92} After setting forth the historical context of the search incident to arrest exception, the Supreme Court in *Gant* held: "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. ***" (Emphasis added and footnote omitted.) *Gant* at 1719.

{¶93} While I recognize that *Gant* arose in the context of a search of a vehicle and the search in the instant case took place in a residence, the underpinnings of the *Gant* decision are equally applicable to a search in a residence since the United States Supreme Court relied on its holding in *Chimel* in arriving at its holding in *Belton*. Moreover, the Supreme Court has consistently held that there is a greater expectation of privacy in a home than in other contexts. See *Payton v. New York*, 445 U.S. 573, 588-589. Therefore, the Supreme Court's holding in *Gant* should, at a minimum, apply with equal force to a search in a home. As a result, pursuant to *Gant*, I believe police are authorized to conduct a search incident to an arrest in a defendant's home only

when, at the time of the search, the defendant is unsecured and within reaching distance of the area to be searched.

{¶94} However, the majority does not acknowledge the limitation placed on this exception by the Supreme Court in *Gant*. I fear the majority's opinion will be construed or misconstrued to authorize the search of any area in a defendant's home in which he was recently found even if there is no reasonable possibility he could gain access to the area at the time of the search. This is exactly the result the Court in *Gant* sought to avoid.

{¶95} In applying the *Gant* test to the search of Mr. Winters' wallet, in order for Agent Sweet to have been authorized to search his wallet incident to his arrest, Mr. Winters would have to have been unsecured *and* within reaching distance of the wallet. With respect to the first element of *Gant*, i.e., whether Mr. Winters was unsecured at the time of the search, Agent Sweet testified that he went to Mr. Winters' apartment with three other law enforcement officers to arrest appellant on an outstanding arrest warrant. One of these officers stayed outside to provide security, while the other two officers accompanied Agent Sweet inside the apartment to assist in making the arrest. It is worth noting that Agent Sweet testified that, prior to making the arrest, he had done some pre-arrest planning and research concerning Mr. Winters, and determined that execution of this warrant on Mr. Winters was "not a high risk type situation." This was due in part to the fact that the warrant was for the failure to pay child support, rather than for a drug offense or an offense involving violence.

{¶96} While Agent Sweet held Mr. Winters at gunpoint, Detective Bilicec of the Geauga County Sheriff's Office walked around Agent Sweet and handcuffed Mr.

Winters behind his back. Detective Bilicec remained in the room with Agent Sweet, another officer, and Mr. Winters. After Mr. Winters was handcuffed, Agent Sweet picked up his wallet and searched it.

{¶97} Although Mr. Winters was still in the room when his wallet was searched, it is undisputed that at the time of the search, he had already been handcuffed from behind. Moreover, in addition to Agent Sweet, there were two other police officers surrounding him so that, under any reasonable standard, Mr. Winters was secured.

{¶98} With respect to the second element of the *Gant* test, namely, whether Mr. Winters was within reaching distance of the wallet at the time, pursuant to *Gant*, the number of law enforcement officers present is relevant to this issue. Id. at 1719. The Supreme Court held:

{¶99} "Neither the possibility of access nor the likelihood of discovering offense-related evidence authorized the search in this case. Unlike in *Belton*, which involved a single officer confronted with four unsecured arrestees, the five officers in this case outnumbered the three arrestees, all of whom had been handcuffed and secured in separate patrol cars before the officers searched Gant's car. Under those circumstances, Gant clearly was not within reaching distance of his car at the time of the search. ***" Id.

{¶100} Here, at the time Agent Sweet searched Mr. Winters' wallet, he was handcuffed behind his back and surrounded by three law enforcement officers, one of whom had just pointed a gun at him. A fourth officer was outside the apartment providing security. Mr. Winters was therefore clearly outnumbered by the officers present. While some possible, imaginary scenario might be conceived in which a

handcuffed defendant in Mr. Winters' position might be able to reach for his wallet, for example, by throwing himself on the floor and picking up the wallet with his teeth or fingers, in light of the fact that Mr. Winters was surrounded by three police officers, short of a contortionist's tour de force, I do not see how he could have reached his wallet. As a result, I believe that, pursuant to *Gant*, at the time of his arrest, Mr. Winters was not within reaching distance of his wallet.

{¶101} In addition, although I agree that "[a] wallet can hide any number of items that could be hazardous to police, such as a small pocket-knife or razor blade," *Combs*, supra, at ¶6, because there is no evidence of the shape or size of the wallet from which one can infer that it could have reasonably contained a weapon, I do not believe Agent Sweet was authorized to search Mr. Winters' wallet.

{¶102} I would, therefore, hold that the trial court erred in finding the search of Mr. Winters' wallet was justified as a search incident to a lawful arrest.

{¶103} I also do not agree with the majority's holding regarding the applicability of the inevitable discovery doctrine. First, I would point out that, in order for the doctrine to be applicable, the state must prove that an inventory search would have been inevitable in this particular case. *United States v. Morillo*, 2009 U.S. Dist. LEXIS 94421 (E.D. Ohio 2009) *45, citing *United States v. Gorski*, 852 F.2d 692, 696 (2d Cir. 1988). In *Gorski*, the Second Circuit held that an inventory search was not inevitable because a "thorough review of the record reveals no evidence that such searches were an invariable, routine procedure in the booking and detention of a suspect at the particular [jail] involved." Id. at 696.

{¶104} There is no evidence in this record that an inventory search would have inevitably and invariably been made in this case. Moreover, there is no evidence as to what jail Mr. Winters was taken to or evidence regarding its procedures, if any, for inventory searches.

{¶105} Further, the record reveals that the trial court attempted to raise this issue by asking Agent Sweet a few preliminary questions concerning whether Mr. Winters' wallet would have been inventoried at the jail. However, after the court asked these questions, the state did not ask any follow-up questions on this issue, nor did it develop any facts that would support it. Moreover, the state does not argue on appeal that Mr. Winters' wallet would have inevitably been discovered as part of a routine inventory search or the booking process. By its decision not to pursue this issue, it is reasonable to infer the state did not believe the inevitable discovery doctrine applied to the facts of this case. Obviously, if it did, it would have presented evidence in support of the requirements of this rule, especially after the trial court attempted to raise the issue. As a result, I do not agree with the majority's holding that Mr. Winters' wallet would have inevitably been discovered apart from the unlawful search.

{¶106} In view of the foregoing analysis, I respectfully dissent.