[Cite as *State v. Hobbs*, 2010-Ohio-589.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	
- vs -	:	**CASE NO. 2008-L-155**
KENNETH L. HOBBS,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 08 CR 000001.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Karen A. Sheppert*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

John D. Lewis, Law Office of John D. Lewis, L.L.C., P.O. Box 2670, Ashtabula, OH 44005-2670 (For Defendant-Appellant).

MARY JANE TRAPP, P.J.

{¶1} Kenneth L. Hobbs appeals from the judgment of the Lake County Court of Common Pleas which convicted him of having weapons while under disability, carrying concealed weapons, and improperly handling firearms in a motor vehicle. These convictions stemmed from the police's discovery of a loaded gun in Mr. Hobbs' vehicle after an officer stopped his vehicle to confirm an outstanding warrant. Mr. Hobbs maintains the search of his vehicle violated his Fourth Amendment rights. For the following reasons, we affirm the trial court's judgment.

{¶2} **Substantive Facts and Procedural History**

{¶3} On December 19, 2007, Officer Regnier of the Wickliffe Police Department encountered Mr. Hobbs' vehicle, a Dodge Intrepid, while the officer exited State Route 2 onto E. 305th Street in Wickliffe, Lake County. Because Wickliffe police officers had been put on notice of recent reports of a stolen Dodge Intrepid in the area, Officer Regnier ran a computer check on the Intrepid's temporary license plate number while Mr. Hobbs' vehicle stopped at the traffic light on the exit ramp. The computer check generated an audible alert of a "possible warrant," and soon afterward the officer's computer screen showed a felony warrant from Euclid, a neighboring city. A photo of the registered owner of the vehicle matched the driver of the Intrepid.

{¶4} As the vehicle proceeded northbound on E. 305th Street into the city of Willowick, Officer Regnier effectuated a stop of the vehicle. The officer advised Mr. Hobbs he had not seen him violate any traffic laws, but explained that his computer check indicated an active felony warrant was outstanding for his arrest and he needed to confirm it. Officer Regnier called the Euclid Police Department and, after confirming the warrant, he returned to Mr. Hobbs, arrested him on the warrant, and placed him in the backseat of his cruiser.

{¶5} At this time two other officers from the Wickliffe Police Department arrived to assist Officer Regnier, who instructed them to conduct an inventory of Mr. Hobbs' vehicle while he called for a tow truck. The two officers discovered a small bag of marijuana and a loaded gun in the center console of the vehicle -- a Charter Arms 5-shot revolver in a suede clip belt holster with the handle sticking up. After Mr. Hobbs was advised of his Miranda rights, Officer Regnier asked him about the ownership of the

gun. Mr. Hobbs would not provide any information, stating only "he had people in the car."

{¶6} The Lake County grand jury indicted Mr. Hobbs of (1) having weapons while under disability, a third-degree felony in violation of R.C. 2923.13(A)(3); (2) carrying concealed weapons, a fourth-degree felony in violation of R.C. 2923.12(A); and (3) improperly handling firearms in a motor vehicle, a fourth-degree felony in violation of R.C. 2923.16(B), which was accompanied by a firearm specification pursuant to R.C. 2942.141. Mr. Hobbs had been previously convicted of possession of drugs and drug trafficking.

{¶7} Mr. Hobbs filed a motion to suppress the evidence. At the suppression hearing, Officer Regnier testified he stopped Mr. Hobbs' vehicle after the computer check indicated an outstanding felony warrant for his arrest from the city of Euclid. He arrested him based on the warrant and asked the officers who had arrived to assist him to conduct an inventory search of the vehicle. The defense counsel conceded that the propriety of the search was not an issue in this case and instead focused on the validity of the traffic stop. As a result, the defense's cross-examination of Officer Regnier concerned only the circumstances of the traffic stop -- whether the officer had a reasonable suspicion for the stop and whether the stop was extrajurisdictional.

{¶8} The state asserted the search of Mr. Hobbs' vehicle was proper. Because the defense conceded the search issue, the prosecution did not introduce evidence regarding the police department's standard procedures for the inventory search of impounded vehicles, or to elicit testimony showing the search was conducted pursuant to its standard practice. After the hearing, the trial court found the stop of Mr.

Hobbs' vehicle to be lawful and denied his motion to suppress. The matter proceeded to a jury trial.

{¶9} Following trial, the jury found Mr. Hobbs guilty of having weapons while under disability, carrying concealed weapons, and improperly handling firearms in a motor vehicle with a firearm specification. For these offenses, the trial court sentenced him to three years in prison for having weapons while under disability, twelve months for carrying concealed weapons, and twelve months for improperly handling firearms in a motor vehicle, all sentences to be served concurrently. The court also imposed a mandatory twelve-month prison term for the firearm specification, to be served consecutively, for a total prison term of four years.

{¶10} Mr. Hobbs appeals from his conviction, assigning three errors for our review.

{¶11} "[1.] The trial court committed prejudicial error in denying appellant's motion to suppress the fruits of an unconstitutional search and seizure, in violation of the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 14 of the Ohio Constitution.

{¶12} "[2.] Appellant was denied the effective assistance of counsel, in violation of his rights under the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution.

{¶13} "[3.] Appellant's conviction is against the manifest weight of the evidence."

{¶14} An appellate review of a motion to suppress presents a mixed question of law and fact. *State v. Korman*, 11th Dist. No. 2004-L-064, 2006-Ohio-1795, ¶12, citing *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8. "The appellate court must

accept the trial court's factual findings, provided they are supported by competent, credible evidence. *** Thereafter, the appellate court must independently determine whether those factual findings meet the requisite legal standard." Id. citing *State v. McNamara* (1997), 124 Ohio App.3d 706.

{¶15} The record in the instant case reflects that at the suppression hearing, the defense focused on the propriety of the traffic stop. It argued specifically that the police's stop of Mr. Hobbs' vehicle was extra-jurisdictional. The defense did not challenge the propriety of the officers' *search* of Mr. Hobbs' vehicle and consequently the trial court did not consider any claim regarding the search of his vehicle. For the first time on appeal, Mr. Hobbs claims the inventory search conducted was not lawful.

{¶16} **<u>Inventory Search</u>**

{¶17} The standard for a lawful inventory search was set forth by the Supreme Court of Ohio in *State v. Hathman* (1992), 65 Ohio St.3d 403, as follows:

{¶18} "To satisfy the requirements of the Fourth Amendment to the United States Constitution, an inventory search of a lawfully impounded vehicle must be conducted in good faith and in accordance with reasonable standardized procedure(s) or established routine." Id. at paragraph one and two of syllabus (citations omitted).

{¶19} In *State v. Duncan*, 11th Dist. No. 2006-L-154, 2007-Ohio-2577, this court summarized the law regarding an inventory search of a vehicle:

{¶20} "An inventory search of an impounded vehicle is a well-recognized exception to the warrant requirement. A routine search of an impounded vehicle is not unreasonable under the Fourth Amendment when it is performed pursuant to a standard

police procedure and when the evidence does not demonstrate the procedure involved is a mere pretext for an evidentiary search of the impounded vehicle.

{¶21} "Once a vehicle is impounded, police may conduct an inventory search provided it is done in good faith and in accord with reasonable standardized procedures or established routine.

{¶22} "The inventory exception to the warrant requirement exists in order to protect the owner's property while in police custody and to insure against claims of lost or stolen property." Id. at ¶26-28 (internal citations omitted).

{¶23} The police officers in this case testified that after Mr. Hobbs' arrest, they found a loaded gun in the center console during an inventory search conducted prior to the impoundment of his vehicle. Having not challenged the lawfulness of the search of his vehicle at the proceedings below, Mr. Hobbs now claims no evidence was presented by the state to show the Wickliffe Police Department conducted the inventory search pursuant to its standardized policy and procedures.

{¶24} Because the propriety of the search of Mr. Hobbs' vehicle was not contested at the suppression hearing, he has waived the issue. Because he had not raised the issue, the prosecution did not have the opportunity to present evidence regarding the Wickliffe Police Department's standard policy and procedures for the inventory search of impounded vehicles and to demonstrate the propriety of the search. Mr. Hobbs, furthermore, has not pointed to anything in the record indicating that the search conducted by the police in this case was more than a routine inventory search of an impounded vehicle.

{¶25} Mr. Hobbs waived his challenge regarding the legality of the search of his vehicle and therefore we overrule his claim on appeal regarding the search. The first assignment of error is overruled.[1]

{¶26} **Ineffective Assistance of Counsel**

{¶27} Mr. Hobbs argues he received ineffective assistance of counsel because his counsel should have focused on the propriety of the search of the vehicle, instead of on the legality of the initial stop at the suppression hearing.

{¶28} To establish his claim that his counsel provided ineffective assistance, Mr. Hobbs must demonstrate (1) his counsel was deficient in some aspect of his representation, and (2) there is a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674.

{¶29} A threshold issue in a claim of ineffective assistance of counsel is whether there was actual error on the part of appellant's trial counsel. *State v. McCaleb*, 11th Dist. No. 2002-L-157, 2004-Ohio-5940, ¶92. In Ohio, every properly licensed attorney is presumed to be competent and therefore a defendant bears the burden of proof. *State v. Smith* (1985), 17 Ohio St.3d 98, 100. Counsel's performance will not be

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1. Under the circumstances in this case, where Mr. Hobbs was lawfully arrested for an outstanding warrant, we note that the search of his vehicle could also be characterized as a legal search pursuant to the search-incident-to-arrest exception. The law in Ohio currently allows a police officer to search the passenger compartment of a vehicle, as a contemporaneous incident of an arrest, after the officer had made a lawful custodial arrest of the occupant of an automobile. *State v. Murrell* (2002), 94 Ohio St.3d 489, syllabus. See, also, e.g., *State v. Schultz*, 11th Dist. No. 2003-L-156, 2005-Ohio-345; *State v. Crenshaw*, 6th Dist. No. L-02-1337, 2003-Ohio-4860. Under *Murrell*, therefore, the search conducted by the police officers here could be a lawful search incident to arrest. However, we note that the United States Supreme Court has recently changed the law in this area. In *Arizona v. Gant* (2009), 129 S.Ct. 1710, the court narrowed its holding in *New York v. Belton* (1981), 453 U.S. 454, 460, the case relied on by the Supreme Court of Ohio in *Murrell*, and now holds that the 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 if it is reasonable to believe the vehicle contains evidence of the offense of

deemed ineffective unless and until the performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. *State v. Acona* (2001), 93 Ohio St.3d 83, 105.

{¶30} Furthermore, decisions on strategy and trial tactics are generally granted wide latitude of professional judgment, and it is not the duty of a reviewing court to analyze the trial counsel's legal tactics and maneuvers. *State v. Gau*, 11th Dist. No. 2005-A-0082, 2006-Ohio-6531, ¶35, citing *Strickland* at 689. Generally, debatable trial tactics and strategies do not constitute ineffective assistance of counsel. *State v. Phillips* (1995), 74 Ohio St.3d 72, 85.

{¶31} Mr. Hobbs' claim of ineffective assistance of counsel is based on an assumption that he would have prevailed on the claim regarding the propriety of the search of his vehicle if his trial counsel had raised the claim. However, he has offered nothing to indicate there could potentially be a valid challenge to the search. From all indications, the search in this case was nothing more than a routine procedure by the police officers upon impounding a vehicle. Therefore, his trial counsel cannot be faulted for choosing to focus instead on the extrajurisdictional nature of the initial stop at the suppression hearing. Mr. Hobbs fails to establish either prong of the *Strickland* test and therefore we overrule the second assignment of error.

{¶32} **Manifest Weight Claim**

{¶33} In his third assignment of error, Mr. Hobbs contends the jury's verdict was against the manifest weight of the evidence. Specifically, he contends the knowing element of the charges against him was presented through circumstantial evidence

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arrest." Id. at 1723. We observe that while the search in the instant case may have been proper as a search incident to arrest pre-*Gant*, the legality of it is called into doubt post-*Gant*.

only. He argues there were no fingerprints on the gun or any other direct evidence which would prove his knowing possession of the gun found in his vehicle.

{¶34} "Unlike sufficiency of the evidence, manifest weight of the evidence raises a factual issue. 'The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *State v. Higgins*, 11th Dist. No. 2005-L-215, 2006-Ohio-5372, ¶35, citing *State v. Thompkins*, 78 Ohio St.3d 380, 387.

{¶35} "Circumstantial evidence and direct evidence inherently possess the same probative value." *State v. Treesh* (2001), 90 Ohio St.3d 460, 485.

{¶36} "The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Fritts*, 11th Dist. No. 2003-L-026, 2004-Ohio-3690, ¶23, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶37} "[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. When examining witness credibility, "the choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan* (1986), 22 Ohio St.3d 120, 123. A fact finder is free to believe all, some, or none of the testimony of each witness appearing before it. *State v. Thomas*, 11th Dist. No. 2004-L-176, 2005-Ohio-6570, ¶29.

{¶38} Here, a forensic fingerprint and firearm examiner for the Lake County Crime Laboratory testified that there were no latent prints found on the firearm. He stated, however, the lack of fingerprints did not surprise him because it was often difficult to obtain latent prints from the surfaces of the firearms. He also explained that, in this particular case, the subject gun was snugly held inside a holster, and therefore when he removed it from the holster, any latent prints could have been rubbed off.

{¶39} To prove he did not knowingly possess the gun, Mr. Hobbs presented the testimony of Robert Gibson, a 25-year-old cook who works at a Friday's restaurant. Mr. Gibson testified that he had been an acquaintance of Mr. Hobbs for three years. He provided the following account of how his gun ended up in Mr. Hobbs' car. On the day of the incident, Mr. Hobbs had hired him to detail his car. While working on the car at his sister's home in Lyndhurst, a friend telephoned him and asked him if would like to go with him to Stonewall Firing Range in Broadview Heights. He went inside his sister's house to retrieve his gun, which, incidentally, he had kept in a safe at his sister's home. He continued to work on Mr. Hobbs' vehicle while waiting for his friend's arrival. He originally placed the gun on the side of his belt, but later put it down inside the center console when he was in the front seat vacuuming, because it "kind of got in the way." His friend never appeared to take him to the firing range. After he finished the detailing job, he called Mr. Hobbs around 8:30 p.m. for him to pick up the car later that evening. He then fell asleep at his sister's house. When he woke up in the morning, Mr. Hobbs had already picked up his car.

{¶40} On cross-examination, the state exposed weaknesses in Mr. Gibson's testimony. He purportedly owned the gun for six years, but rather implausibly, he did

not know how to load a gun. Instead, his friend would load the gun for him. Furthermore, he did not know the type of ammunition that had been loaded in the gun. He also stated he made no efforts to contact Mr. Hobbs when he realized the following day he had left the loaded gun in Mr. Hobbs' vehicle. He stated when he learned of Mr. Hobbs' arrest a few days later, he did not come forward to claim his ownership of the gun. He testified he waited for several months before he spoke with the defense counsel about the circumstances of how the gun ended up in Mr. Hobbs' vehicle.

{¶41} Given the weaknesses and implausibility in Mr. Gibson's testimony, we cannot conclude that in resolving conflicts in the evidence, the jury clearly lost its way in discrediting Mr. Gibson's testimony and created such a manifest miscarriage of justice in finding Mr. Hobbs guilty that his conviction must be reversed and a new trial ordered.

{¶42} The third assignment of error is overruled.

{¶43} For all the foregoing reasons, we affirm the judgment of the Lake County Court of Common Pleas.

CYNTHIA WESTCOTT RICE, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

{¶44} I dissent from the majority as the present search incident to arrest clearly is unconstitutional under the recent United States Supreme Court holding in *Arizona v. Gant* (2009), 129 S.Ct. 1710.

{¶45} *Gant's* far reaching holding narrowly interprets prior United States Supreme Court holdings in a myriad of federal and state law cases over the last twenty-eight years. The holding substantially narrows the ability of law enforcement to search vehicles incident to arrest. The holding in *Gant* requires a narrow reading of its prior cases, specifically *Chimel v. California* (1969), 395 U.S. 752, and applied to vehicle searches in *New York v. Belton* (1981), 453 U.S. 454. The narrowing of these precedents renders the Supreme Court of Ohio precedent of *State v. Murrell* (2001), 94 Ohio St.3d 489, squarely in conflict with that precedent. The Ohio Supreme Court held in *Murrell*, at 496:

{¶46} "Consistent with *Belton*, we hold that when a police officer has made a lawful custodial arrest of the occupant of an automobile, the officer may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile. Under our holding, the warrantless search of appellant's vehicle did not violate the Fourth Amendment or Section 14, Article I."

{¶47} Based upon the Ohio Supreme Court's holding, we must look to *Gant* in its invalidation of *Belton* and apply them to these facts at hand.

{¶48} The first exception to the warrant requirement presented by these facts is a search incident to a lawful arrest. Clearly, the arrest of the driver of the car for a prior arrest warrant was a lawful arrest. The question then becomes whether the search of the car and its contents was a search incident to the lawful arrest.

{¶49} The United States Supreme Court has recently clarified the law in this area. In *Gant*, supra, the Court held that the search of Rodney Gant was not incident to a lawful arrest when Gant was handcuffed and locked in the back of a patrol car when

his vehicle was searched. Under the circumstances, Gant could not have accessed his car to retrieve weapons or evidence at the time of the search. The Court also noted that, in the automobile context, a search incident to arrest may also exist when it is reasonable to believe that evidence of the offense of arrest might be found.

{¶50} In *Gant* the Court clarified and limited its position of search incident to arrest. The Court held that the search incident to arrest exception to the Fourth Amendment's warrant requirement, as defined in *Chimel*, supra, and applied to vehicle searches in *Belton,* supra, did not justify the search.

{¶51} The Court in *Gant*, supra, at 1719, stated: "[t]o 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. ***" (Footnote and parallel citation omitted.)

{¶52} The basis for all of this search incident to arrest case law in Ohio relies upon a broad interpretation of *Belton* which the *Gant* decision has severely limited in scope and application. The United States Supreme Court's interpretation of the *Belton* decision in *Gant* rejected the broad reading of *Belton* and held 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.

{¶53} The Court in *Gant*, supra, at 1719, clarified the issue of supplying a reasonable basis for arrest:

{¶54} "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 U.S. [615], at 632, *** [(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 *** (2001); *Knowles v. Iowa*, 525 U.S. 113, 118 *** (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.

{¶55} "***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 and Thornton were 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. C.f. *Knowles*, 525 U.S., at 118 ***. 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. (Parallel citations omitted.)

{¶56} The United States Supreme Court in *Gant*, supra, at 1720, has "recognized that a motorist's privacy interest in his vehicle is less substantial than in his home, see *New York v. Class*, 475 U.S. 106, 112-113, *** (1986), the former interest is nevertheless important and deserving of constitutional protection, see *Knowles*, 525 U.S., at 117, ***. It is particularly significant that *Belton* searches authorize police officers to search not just the passenger compartment but every purse, briefcase, or other container within that space. A rule that gives police the power to conduct such a search whenever an individual is caught committing a traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, creates a serious and recurring threat to the privacy of countless individuals. Indeed, the character of that threat implicates the central concern underlying the *Fourth Amendment* – the concern about giving police officers unbridled discretion to rummage at will among a person's private effects.[5]

{¶57} "5. See *Maryland v. Garrison*, 480 U.S. 79, 84, *** (1987); *Chimel*, 395 U.S., at 760-761, ***; *Stanford v. Texas*, 379 U.S. 476, 480-484, *** (1965); *Weeks v. United States*, 232 U.S. 383, 389-392, *** (1914); *Boyd v. United States*, 116 U.S. 616, 624-625, *** (1886); see also 10 C. Adams, The Works of John Adams 247-248 (1856). Many have observed that a broad reading of *Belton* gives police limitless discretion to conduct exploratory searches. See 3 LaFave § 7.1(c), at 527 (observing that *Belton* creates the risk 'that police will make custodial arrests which they otherwise would not

make as a cover for a search which the *Fourth Amendment* otherwise prohibits'); see also *United States v. McLaughlin*, 170 F.3d 889, 894 (CA9 1999) (Trott, J., concurring)(observing that *Belton* has been applied to condone 'purely exploratory searches of vehicles during which officers with no definite objective or reason for the search are allowed to rummage around in a car to see what they might find'); *State v. Pallone*, 2000 WI 77, ¶87-90, 236 Wis.2d 162, 203-204, and n 9, *** (2000)(Abrahamson, C.J., dissenting)(same); *State v. Pierce*, 136 N.J. 184, 211, *** (1994)(same)." (Parallel citations omitted.)

{¶58} Furthermore, the United States Supreme Court understood the gravity of its decision and explicitly dealt with the factors that contributed to the now unacceptable expansion of the "bright line" *Belton* rule of automobile search incident to arrest procedures.

{¶59} The Court in *Gant*, supra*,* at 1722-1723*,* in responding to Justice Alito's dissent, further held:

{¶60} "[w]e do not agree with the contention in Justice Alito's dissent (hereinafter dissent) that consideration of police reliance interests requires a different result. Although it appears that the State's reading of *Belton* has been widely taught in police academies and that law enforcement officers have relied on the rule in conducting vehicle searches during the past 28 years, *** many of these searches were not justified by the reasons underlying the *Chimel* exception. Countless individuals guilty of nothing more serious than a traffic violation have had their constitutional right to the security of their private effects violated as a result. The fact that the law enforcement community may view the State's version of the *Belton* rule as an entitlement does not establish the

sort of reliance interest that could outweigh the countervailing interest that all individuals share in having their constitutional rights fully protected. If it is clear that a practice is unlawful, individuals' interest in its discontinuance clearly outweighs any law enforcement 'entitlement' to its persistence. Cf. *Mincey v. Arizona,* 437 U.S. 385, 393, *** (1978) ('(T)he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the *Fourth Amendment.*')" (Footnote and parallel citations omitted.)

{¶61} The question before us in this case, given the narrow interpretation of *Gant* and the fact that Mr. Hobbs was locked and cuffed in the police cruiser based upon an arrest warrant prior to the search, was could the police reasonably have believed either that Mr. Hobbs 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? If the answer is no, the search in this case was unreasonable. The reason why Mr. Hobbs was arrested and placed in the cruiser prior to the search, was a warrant for his arrest. This was ascertained immediately upon verification from the bureau of criminal investigation. There could be no evidence pertaining to that warrant hidden in the vehicle. Further, Mr. Hobbs was already cuffed in the police cruiser when the search occurred. Based upon *Gant*, and its application to the Ohio Supreme Court's ruling in *Murrell*, this search must be suppressed as an invalid search and seizure pursuant to the Fourth Amendment to the U.S. Constitution.

{¶62} For the foregoing reasons, I dissent.