IN THE UTAH COURT OF APPEALS

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State of Utah, Plaintiff and Appellee, v. Daniel Larry, Defendant and Appellant.	)	MEMORANDUM DECISION (Not For Official Publication) Case No. 20081015-CA F I L E D (March 18, 2010) 2010 UT App 65

Second District, Ogden Department, 071901240
The Honorable Pamela G. Heffernan

Attorneys: Randall W. Richards, Ogden, for Appellant
Mark L. Shurtleff and Marian Decker, Salt Lake City, for Appellee

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Before Judges Davis, McHugh, and Thorne.

THORNE, Judge:

Daniel Larry appeals from convictions of possession of cocaine and drug paraphernalia. Specifically, Larry argues, based on the United States Supreme Court's ruling in Arizona v. Gant, 129 S. Ct. 1710 (2009), that his trial counsel rendered ineffective assistance of counsel by failing to file a motion to suppress the drug evidence and that the trial court committed plain error by failing to sua sponte suppress said evidence.

"An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law." State v. Ott, 2010 UT 1, ¶ 16, 647 Adv. Rep. 19 (internal quotation marks omitted). "To prove ineffective assistance of counsel, [a] defendant must show: (1) that counsel's performance was objectively deficient and (2) a reasonable probability exists that but for the deficient conduct defendant would have obtained a more favorable outcome at trial." Id. ¶ 22 (internal quotation marks omitted). "To satisfy the first part of the test, [a] defendant must overcome the strong presumption that [his] trial counsel rendered adequate assistance." Id. (second alteration in original) (internal quotation marks omitted). To succeed under a plain error claim, a defendant must initially establish that error occurred. See State v. Dunn, 850 P.2d 1201, 1208 (Utah

1993) ("[T]o establish the existence of plain error and to obtain appellate relief from an alleged error that was not properly objected to, the appellant must show the following: (i) An error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful . . . .").

Both of the issues Larry presents are predicated on his contention that, pursuant to the recent Supreme Court's decision in Gant, police officers may not justify a search of a vehicle as incident to arrest when arresting the driver for a nonviolent offense. Larry argues the search of the vehicle in which he was riding violated his Fourth Amendment rights against unreasonable searches and seizures and that the resulting drug evidence should have been suppressed. Contrary to Larry's contention, the law in effect at the time did not support a plain error challenge to the search of the vehicle, Gant not having been decided until approximately six months after Larry's trial. Under the law at the time of trial, it was widely understood that New York v. Belton, 453 U.S. 454 (1981), established the rule that "'[w]hen a police[officer] has made a lawful custodial arrest of the occupant of an automobile, he [or she] may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.'" State v. Chevre, 2000 UT App 6, ¶ 14, 994 P.2d 1278 (quoting Belton, 453 U.S. at 460); see also Gant, 129 S. Ct. at 1718 (stating that 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"); State v. Harmon, 910 P.2d 1196, 1203 (Utah 1995); State v. Giron, 943 P.2d 1114, 1118 (Utah Ct. App. 1997); State v. Moreno, 910 P.2d 1245, 1248-49 (Utah Ct. App. 1996); State v. Spurgeon, 904 P.2d 220, 227-28 (Utah Ct. App. 1995); State v. Rochell, 850 P.2d 480, 484 (Utah Ct. App. 1993); State v. Harrison, 805 P.2d 769, 784 (Utah Ct. App. 1991).

Here, the vehicle search occurred after the driver was arrested for an outstanding warrant. Thus, under Belton the search would have been proper. Because we have concluded that the search would have been proper as a search incident to arrest, an exception to warrantless searches in effect at the time of the trial, Larry cannot overcome the strong presumption that his trial counsel rendered adequate assistance nor demonstrate plain error when his trial counsel and the trial court relied on the state of the law at the time. Larry does not argue retroactive application of Gant. Accordingly, Larry's trial counsel did not provide ineffective assistance. Similarly, because the law in effect at the time did not support a challenge to the search of the vehicle, we find no plain error in the trial court's failure to sua sponte suppress the drug evidence. We therefore affirm

Larry's convictions for possession of cocaine and drug paraphernalia.

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William A. Thorne Jr., Judge

WE CONCUR:

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James Z. Davis,
Presiding Judge

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Carolyn B. McHugh,
Associate Presiding Judge