# COURT OF APPEALS
# DECISION
# DATED AND RELEASED

February 22, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

## NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 95-1681-CR**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT IV**

**STATE OF WISCONSIN,**

**Plaintiff-Appellant,**

**v.**

**KIMBERLY SOTELO,**

**Defendant-Respondent.**

APPEAL from an order of the circuit court for Dane County: MICHAEL B. TORPHY, Judge. *Reversed*.

SUNDBY, J. The State appeals from an order suppressing evidence seized in a search of defendant Kimberly Sotelo's automobile, incident to her arrest for a traffic violation. It presents one issue:

May a police officer who has made a lawful arrest of a motorist after a traffic stop, search the motorist's vehicle incident to arrest even though she is handcuffed and

> secured in a squad car twenty feet from the vehicle searched?

We[1] conclude that under the so-called ***Belton***[2] bright-line rule, the police officer's search in this case did not violate the Fourth Amendment. We therefore reverse the order granting Sotelo's motion to suppress.

In her statement of the issue, Sotelo adds that the police officer lacked probable cause to believe that her car contained contraband and the officer did not impound the car. Because the State justifies the unwarranted search of Sotelo's automobile as incident to her lawful custodial arrest, these considerations are not relevant.

*Background*

On April 2, 1995, at 9:55 p.m., Officer Lisa Kaufman stopped an automobile with its lights off operated by Sotelo. Her routine check disclosed that Sotelo was the subject of an arrest warrant. Kaufman required Sotelo to step out of her car but allowed her to remove her jacket and place it in the car. Officer Kaufman then searched and handcuffed Sotelo and seatbelted her in the back seat of Kaufman's squad car, parked at least twenty feet behind Sotelo's car. Kaufman then searched Sotelo's car, without consent or a warrant. The officer found and seized marijuana in Sotelo's jacket.

The trial court granted Sotelo's motion to suppress evidence of her possession of marijuana. The court stated: "This can hardly be classified as a search incident to an arrest."

***Chimel v. California***

---

[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS. "We" and "our" refer to the court.

[2] ***New York v. Belton***, 453 U.S. 454 (1981).

***Chimel v. California***, 395 U.S. 752 (1969), established the "grabbable area" test for warrantless searches incident to custodial arrests. ***Chimel*** involved a warrantless search of the arrestee's premises, not the search of an automobile. The Court expressly overruled ***Harris v. United States***, 331 U.S. 145 (1947) and ***United States v. Rabinowitz***, 339 U.S. 56 (1950), which allowed the police to make a warrantless search of the entire premises incident to an arrest of the occupant. *See* 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 7.1(a), at 433 (1996).

The ***Chimel*** majority reasoned that because the rationale underlying search incident to arrest was the need to prevent the arrestee from obtaining a weapon or destroying evidence, such a search could extend only to "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." ***Id***. at 433-34 (quoting ***Chimel***, 395 U.S. at 763).

The lower courts were initially hesitant to apply ***Chimel*** to warrantless searches of vehicles incident to arrest. ***Id***. at 434. Most of the lower court decisions applying ***Chimel*** to searches of automobiles dealt with situations in which the arrestee was outside the vehicle at the time of the search. ***Id***. at 435. The courts were widely divided on the question whether ***Chimel*** allowed warrantless custodial incident-to-arrest searches where it was extremely unlikely that the arrestee could regain access to his or her car. ***Id***. The Court resolved the conflicts in ***New York v. Belton***, 453 U.S. 454 (1981).

## *New York v. Belton*

Belton was a passenger in a speeding car stopped by New York State Police. When he asked for the operator's driver's license, the officer smelled marijuana. He arrested the vehicle's four occupants, removed them from the car, patted them down, and separated them outside the car while he searched the car. The search revealed a package of cocaine in the zippered pocket of Belton's jacket in the back seat. 453 U.S. at 455-56. The New York Court of Appeals held that the cocaine was obtained pursuant to a warrantless search of an inaccessible jacket which could not possibly have been reached by the defendant, who was detained outside and away from the stopped car. It

held the search did not fall within the exception provided for searches incident to a lawful arrest. ***Id***. at 456-57.

The United States Supreme Court reversed, holding that the evidence was erroneously suppressed. The Court attempted to create a "bright-line" rule to guide the police in searching motor vehicles incident to "lawful custodial arrests."[3] The Court stated: "[W]e 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." ***Id.*** at 460 (footnote omitted).[4] ***Belton*** presumes that the

---

[3] ***Belton*** has been sharply criticized, both by courts and commentators. In ***Robbins v. California***, 453 U.S. 420, 449 (1981), *overruled by* ***United States v. Ross***, 456 U.S. 798 (1982), Justice Stevens criticized the Court's decision as an "extraordinarily dangerous detour" from Fourth Amendment principles. (Stevens, J., dissenting.) Several states have declined to follow ***Belton***. In ***People v. Torres***, 543 N.E.2d 61 (N.Y. 1973), the court observed that "search and seizure law [becomes] uncontrollable when the rubric [is] adopted and the rationale discarded." ***Id***. at 64 (quoting ***People v. Brosnan***, 298 N.E.2d 78, 86 (N.Y. 1973) (Wachter, J., dissenting)) (alterations in original). The court found that article I, § 12 of the state constitution provided greater protection from searches and seizures than did the Fourth Amendment to the United States Constitution, as construed in ***Belton***. *See also* ***State v. Stroud***, 720 P.2d 436, 439 (Wash. 1986). Professor LaFave criticizes ***Belton*** as follows:

> On balance ... there is good reason to be critical of the Court's work in ***Belton***. How long it will survive, and in what form, remains to be seen. The author of ***Belton*** has retired, and the continuing members of the Court are equally divided on the question discussed here. Perhaps more important, however, is the fact that the Court in ***Belton*** appears to have been influenced by other, related problems as to which it could not reach a consensus in the companion case of [***Robbins***]. Should those problems later be resolved, the search incident to arrest situation will look quite different than it appeared to the ***Belton*** majority, in which event the rule of that case may well be abandoned.

3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 7.1, at 140 (Supp. 1982) (quoted in ***State v. Hernandez***, 410 So.2d 1381, 1385 (La. 1982)). The dissent in ***State v. Fry***, 131 Wis.2d 153, 187 & n.2, 388 N.W.2d 565, 580, *cert. denied*, 479 U.S. 989 (1986), criticizes ***Belton*** as well. (Bablitch, J., dissenting.)

[4] The Court further held: "[I]t follows from this conclusion that the police may also examine the contents of any containers found within the passenger compartment, for if the

interior of an automobile, including any containers therein, is within the arrestee's "immediate control."

LaFave says: "[U]nder ***Belton*** a search of the vehicle is allowed even after the defendant was removed from it, handcuffed, and placed in the squad car, or even if a single defendant was in the custody of several officers." SEARCH AND SEIZURE § 7.1(c), at 448-49. LaFave is not optimistic about the vitality of ***Belton***. *See* ***State v. Pulver***, No. 93-1117-CR, unpublished slip op. at n.6 (Wis. Ct. App. Nov. 11, 1993).[5]

Whatever the future, ***Belton*** is presently binding on all federal courts, and on state courts unless the court concludes that its state's constitution requires a different result. The Wisconsin Supreme Court considers that it is bound to follow the United States Supreme Court's interpretations of the Fourth Amendment in applying article I, § 11 of the Wisconsin Constitution, which is virtually identical to the Fourth Amendment. ***State v. Fry***, 131 Wis.2d 153, 172, 388 N.W.2d 565, 573, *cert. denied*, 479 U.S. 989 (1986).

### *State v. Fry*

The court affirmed Fry's conviction for carrying a concealed weapon, which the police discovered in a warrantless search of the locked glove compartment of his automobile, incident to his custodial arrest. Fry argued that the search did not qualify as a search incident to arrest because he was not in the car when the officers searched it. 131 Wis.2d at 159, 388 N.W.2d at 568. The court adopted what it considered the ***Belton*** rule:

> A police officer may assume under ***Belton*** that the interior of an automobile is within the reach of a defendant when

(..continued)

passenger compartment is within reach of the arrestee, so also will containers in it be within his reach." ***Belton***, 453 U.S. at 460. ***Belton*** makes clear that the fact the evidence is held in a separate container within the automobile is irrelevant. *Accord* ***Fry***, 131 Wis.2d at 178, 388 N.W.2d at 576 ("We conclude that all closed containers, locked or unlocked, in an automobile which may be searched incident to an arrest can be searched."); *see also* ***California v. Acevedo***, 500 U.S. 565 (1991); ***United States v. Ross***, 456 U.S. 798 (1982).

[5] We cite ***Pulver*** only for its discussion, not as precedent.

> the defendant is still at the scene of an arrest but the defendant is not physically in the vehicle. We cannot say as a matter of fact in all cases that a defendant never could regain access to the interior of an automobile after initially leaving the vehicle.

***Id***. at 174, 388 N.W.2d at 574.

The ***Fry*** court rejected a case-by-case analysis of warrantless searches of automobiles which would depend on whether the police reasonably believed that an arrestee could escape from their control and regain access to an automobile. ***Id***. at 175, 388 N.W.2d at 574. The court said that that alternative was unworkable because of the unpredictability of such escapes. ***Id***. The court preferred ***Belton's*** "bright-line" rule because it relieves the officer of making ad hoc at-the-scene decisions to search or not to search.

However, ***Fry*** leaves uncertain how much of ***Belton's*** bright-line rule the court intended to adopt. The court said:

> The search is based on a need to protect evidence or the police and includes the area in the defendant's reach or presence. The exigency is the defendant's potential for regaining access to the area of the car.

131 Wis.2d at 181, 388 N.W.2d at 577.

This statement does not describe ***Belton's*** bright-line rule. The ***Belton*** court specifically rejected the case-by-case analysis required by ***Fry's*** reliance upon defendant's potential for regaining access to his or her vehicle. *See* 453 U.S. at 459. The ***Belton*** bright-line rule is simple and easily applied:

> [W]e 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.

***Id***. at 460 (footnote omitted).

Whether ***Belton's*** bright-line rule will survive is another matter which need not concern us.

*Is This Case Different?*

On their facts, neither ***Belton*** nor ***Fry*** involved a fact situation such as that presented here; neither Belton nor Fry would have had to possess Houdini-like powers to regain access to his automobile. *See* ***United States v. Vasey***, 834 F.2d 782, 787 (9th Cir. 1971). Here, however, Sotelo was handcuffed, seatbelted and locked in the squad car's "cage." Two armed officers were present. Clearly, ***Chimel's*** "grabbable area" rule would not justify the warrantless search which the officer made in this case.

However, in accord with its disavowal of an intent to change ***Chimel's*** rule,[6] the ***Belton*** Court said: "Our holding today does no more than determine the meaning of ***Chimel's*** principles *in this particular and problematic context*. 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 (emphasis added). ***Belton's*** "problematic context" is the warrantless search of an automobile. Warrantless searches of premises remain subject to the ***Chimel*** rule. LaFave concludes that the ***Belton*** Court erred in not considering the automobile exception.[7] Plainly, the Court's bright-line rule may have to be considered in future automobile exception cases.

The only low-voltage areas of ***Belton's*** bright-line rule concern when a search is contemporaneous with the occupant's arrest and what constitutes the passenger compartment of an automobile. Neither of these concerns is present here. Other problematic areas--whether there was a lawful custodial[8] arrest and the search of containers--must be explored by already

---

[6] Its bright-line rule added a new dimension to the "automobile exception."

[7] The ***Belton*** Court said: "Because of [our] disposition of the case, there is no need here to consider whether the search and seizure were permissible under the so-called `automobile exception.'" 453 U.S. at 462 n.6.

[8] In reading ***Belton, Fry*** and other cases, it is easy to overlook the importance of the

established rules which are not so bright. However, Sotelo does not ask us to illumine these dark corners.

While certain language of ***Fry*** does not track ***Belton's*** rule, because the Wisconsin court follows the United States Supreme Court's Fourth Amendment decisional law, we conclude that precedential decisional law requires that we hold that the trial court erred in granting Sotelo's motion to suppress.

*By the Court.*—Order reversed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

(..continued)
word "custodial."