



LEGAL UPDATE

City of Madison Police Department

Spring 2009

Captain Victor Wahl

Vehicle Searches Incident to Arrest

***Arizona v. Gant*, No. 07-542 (2009); Decided April 21, 2009 by the United States Supreme Court.**

On April 21, the U.S. Supreme Court released its decision in *Arizona v. Gant*. The decision has a major impact on day-to-day police operations, and significantly limits the circumstances under which officers can search a vehicle incident to the arrest of a driver or occupant.

The fact situation at issue in *Gant* was not uncommon: officers investigating a drug incident arrested Gant out of a vehicle (for driving with a suspended license and a traffic warrant). Gant was handcuffed and secured in a squad car. Officers then searched his vehicle (incident to his arrest) and located cocaine and a handgun in the vehicle. Gant was charged with criminal drug charges; he challenged the search of his vehicle, arguing that it was not a valid search incident to arrest.

In 1969, the U.S. Supreme Court ruled that a police search incident to arrest is limited to the arrestee and the area within the arrestee's immediate control. *Chimel v. California*, 395 U.S. 752 (1969). In 1981, the court clarified the applicability of this rule to the vehicle context, and ruled that officers may search the passenger compartment of a vehicle contemporaneous to the arrest of a driver or passenger. *New York v. Belton*, 453 U.S. 454 (1981). While the *Chimel* and *Belton* decisions discussed "officer safety and evidence preservation" as the basis for permitting these searches, the practical impact has been that searches of vehicles incident to the arrest of a driver or occupant have been permitted as bright-line rule. Officers have been trained this way for almost 30 years, and it has been ingrained into police decision making.

The *Gant* case, however, expressly rejected the bright-line rule permitting vehicle searches incident to the arrest of a driver or occupant. Instead, the court ruled that a vehicle search incident to arrest is only permitted in two situations:

- If the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search
- If it is reasonable to believe the vehicle contains evidence of the offense of arrest.

The first justification is, in my view, pretty meaningless. If someone is unsecured it is highly doubtful that they would

be considered under arrest anyway. Also, keeping a suspect unsecured in a position to access a vehicle while you search it obviously creates officer safety concerns. So, the first possible justification offered by the *Gant* court seems pretty meaningless. Indeed, the court recognized this in a footnote: "Because officers have many means of ensuring the safe arrest of vehicle occupants, it will be the rare case in which an officer is unable to fully effectuate an arrest so that a real possibility of access to the arrestee's vehicle remains."

The second possible justification—if it is reasonable to believe that the vehicle contains evidence of the offense of arrest—seems to have more potential applicability. Unfortunately, the *Gant* court did not provide any guidance on what kind of burden "reasonable to believe" means in this context. A close reading of the decision leads me to believe that the *Gant* court did not intend "reasonable to believe" to mean "probable cause," and instead is setting the standard lower, at something similar to a reasonable suspicion standard.

So, if an officer makes an arrest from a vehicle for an offense for which physical evidence is not relevant (most traffic offenses, warrants, etc.) a search of the vehicle incident to arrest will not be permissible. If an officer makes an arrest from a vehicle for an offense for which physical evidence is relevant (drug offenses, weapons offenses, etc.) I believe a search of the vehicle incident to arrest will be permissible if the officer has a reason to believe the vehicle contains evidence of the offense of arrest. My interpretation of *Gant* is that this is a low burden; subsequent court decisions will provide clarification on this issue.

The court did not specifically address what the scope of a vehicle search incident to arrest might be; however I think it is reasonable to conclude that a search under these circumstances will extend to anywhere in the passenger compartment—including containers and the glove compartment—where the evidence could be. So, an officer making a drug arrest who had a reason to believe that drug evidence was in the vehicle would be able to perform a search similar to that permitted pre-*Gant*. If the evidence sought was something larger (a weapon, stolen property, etc.) then the scope of the search would be restricted (to those places where the evidence sought could be).

Remember that the *Gant* decision applies only to vehicle searches incident to arrest; searches conducted under other legal theories are unaffected. Officers may want to give additional consideration to vehicle searches under these theories if appropriate:

Probable Cause Searches: If an officer has probable cause to believe that a motor vehicle contains contraband or evidence of a crime, it may be searched without a warrant. As long as the vehicle is in a location that is accessible to the public, no warrant is required. In many circumstances pre-*Gant*, officers likely did not even consider whether a probable cause search was justified (as so many searches were justified incident to arrest). So, officers should consider whether probable cause to search is present in arrest situations where *Gant* does not permit a search incident to the arrest.

A probable cause search is not limited to the passenger compartment; the search is only limited to places in the vehicle where the item(s) being sought could be located. Remember that probable cause can be obtained through a variety of means, including observations made from the exterior of the vehicle and an alert from a K9.

Vehicle frisk/protective search: If an officer has reasonable suspicion that a vehicle driver or occupant is armed, that person may be frisked for weapons. Remember that the frisk doctrine extends to the passenger compartment of a vehicle: so if you can frisk the driver or an occupant for weapons, you can “frisk” the interior of the vehicle also (some courts refer to this as a “protective search”). The scope of a vehicle “frisk” is limited to anywhere in the passenger compartment where a weapon could be. The reasonable suspicion standard required to justify a frisk is a low one, and courts will look at the particular facts in each incident to evaluate whether the frisk was reasonable.

Consent: In virtually any context, an officer can ask a vehicle’s owner/driver for consent to search. Remember that the consent must be given voluntarily, and that the scope of the search is limited to the scope of consent provided. So, it is important for officers to phrase their request for consent in a manner that does not limit the scope of the search. Remember that MPD policy requires officers to have an articulable reason for asking for consent to search a vehicle.

Inventory: Vehicles that are impounded and taken into police custody may be inventoried. The purpose of an inventory search is not to seek evidence, but is to safeguard property and protect police from claims of theft/misconduct.

Abandonment: In most cases, someone who leaves their vehicle and flees from police gives up their expectation of privacy in the vehicle, allowing it to be searched.

Community Caretaker: In some instances, the community caretaker doctrine might allow officers to enter and/or search a motor vehicle.

Some of the questions *Gant* leaves unanswered will undoubtedly be addressed in future decisions. Until then, however, officers should adhere to these guidelines when conducting vehicle searches incident to arrest.

Disorderly Conduct—Visible Weapons

Wisconsin’s Attorney General recently released an advisory memorandum discussing the applicability of the disorderly conduct statute to individuals openly carrying firearms. The central point of the memorandum was: “mere open carry of a firearm, absent additional facts and circumstances, should not result in a disorderly conduct charge.” Many have asked what impact, if any, this has on MPD officers’ decisions when confronted with these types of situations. The short answer is that this does not change the way in which MPD officers respond to reports of people openly carrying firearms. A few points:

First, it is important to realize that the memorandum is advisory only, and is for “educational and informational” purposes. It does not in any way restrict the legal authority of officers to take action or of individual prosecutors to pursue charges.

Second, the memo only addressed the applicability of the disorderly conduct statute to the open carrying of a firearm. It did not in any way address any other firearm-related statutes.

Third, the memo confirms that officers in most circumstances can stop a person openly carrying a firearm in public to investigate possible criminal activity.

Finally, a close reading of the memo makes it clear that the Attorney General’s position is simply that a disorderly conduct charge is not automatically appropriate anytime someone is openly carrying a firearm. The examples provided by the memo illustrate this:

- “a hunter openly carrying a rifle or shotgun on his property during hunting season while quietly tracking game should not face a disorderly conduct charge. But if the same hunter carries the same rifle or shotgun through a crowded street while barking at passerby, the conduct may lose...its protection.”
- “A person openly carrying a holstered handgun on his own property while doing lawn work should not face a disorderly conduct charge...if, however, a person brandishes a handgun in public, the conduct may lose its...protection.”

So, MPD officers responding to reports of an individual openly carrying a firearm should continue to respond as was the case prior to this memo’s release. The suspect should generally be detained, using proper tactics to ensure officer and community safety. Officers should then conduct an investigation to determine whether an arrest is appropriate. To support a disorderly conduct charge it will continue to be necessary to show that the carrying of the firearm—under those particular circumstances—was the type of behavior that caused, or tends to cause, a disturbance. The location of the incident, the behavior of the suspect and the reactions of witnesses will all be relevant to this determination.