Search and Seizure After "Arizona v. Gant"

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Is Gant the biggest (criminal procedure) case since Miranda?

Who knows?

We do know that Miranda arose out of Phoenix, and now we have the Gant case arising out of Tucson. Miranda is arguably the biggest Fifth Amendment case of all time.

Will Gant be the biggest Fourth Amendment case of all time?

For 28 years, police officers across the country had a “free” search of the passenger compartment of vehicles after they placed an occupant of a vehicle under arrest. Not anymore.

What do we mean by a “free” search?

All legal “rules” must be tied to a rationale. We learned that in law school. Somehow the “search incident to lawful arrest” rule, as it relates to vehicles, became unanchored from its underlying rationale. Originally, the rationales for the search incident exception to the warrant requirement were:

• to protect officers from an arrestee’s attempt to access a weapon, and
• to prevent an arrestee from destroying evidence.

To understand the importance of this issue, and Gant, lawyers (and peace officers) must understand the following trilogy of United States Supreme Court cases, which culminated in Gant.

Chimel v. California (1969)

In the landmark case of Chimel v. California, officers arrested the suspect in his house. A short time later, the officers discovered crime-related evidence in a room other than where the arrest took place. The United States Supreme Court’s holding was essentially that, after lawfully arresting Chimel, officers could not search other rooms in the house because Chimel was unable to enter those rooms. The Court said that the search incident to arrest doctrine required that the search be limited to areas in which Chimel could access a weapon or destroy evidence—areas within Chimel’s immediate control at the time of the arrest.

Most officers interpreted this as the “lunging distance”
rule. Most lawyers and peace officers thought the Chimel doctrine applied to vehicles—until 12 years later, when the Supreme Court decided New York v. Belton.5

In Belton, the Court tackled a search incident to arrest case involving a vehicle.

An officer lawfully arrested four occupants of a vehicle, one of whom was Belton, and placed the arrested individuals at the four exterior corners of the vehicle. The officer did not handcuff the arrestees. The officer found Belton’s jacket in the back seat, unzipped a pocket, and found illegal drugs. The Court decided to create a “bright-line” rule to the effect that officers could always search the passenger compartment of a vehicle, and closed containers therein, incident to the valid custodial arrest of an occupant of the vehicle.

Most state courts interpreted this to mean that officers could search the passenger compartment regardless of whether the arrestee was handcuffed. But the United States Supreme Court did not decide this specific issue—until Arizona v. Gant.

Arizona v. Gant (2009)6
Officers arrested Gant as he got out of his vehicle. The charge was an outstanding arrest warrant for driving with a suspended license. The officers then handcuffed Gant, put him in the back of the police car and searched the passenger compartment of his car, finding a weapon and illegal drugs.

Both the Arizona Court of Appeals7 and the Arizona Supreme Court8 determined that Belton could not be construed to extend the search incident doctrine to situations in which the arrestee had been handcuffed and placed in the back of a patrol car.9

The State of Arizona filed a petition for writ of certiorari in the United States Supreme Court, which was granted in February 2008.10 The Supreme Court held that a car may not be searched incident to arrest after the arrestee has been

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handcuffed and placed in a patrol vehicle because, at that point, there is little chance that the arrestee will be able to get to a weapon or evidence.11

Other Vehicle Search Theories That Remain Viable

Although the search incident to arrest doctrine has been altered (at least as it relates to the search of vehicles), probably forever, several other longstanding theories for searching a vehicle are unchanged by Gant. They are:

- probable cause (the automobile exception)12
- probable cause (warrant)13
- consent14
- Terry doctrine15
- exigency doctrine16
- inventory17
- miscellaneous doctrines and theories18

Issues Raised, But Not Resolved, by Gant

The Supreme Court resolved an important issue in Gant, but raised many others. These issues will be important to Arizona attorneys and ultimately must be resolved by Arizona courts:

Will officers be permitted to search for evidence related to the arrest?

In dicta, the Gant majority stated that, although officers cannot automatically conduct a search incident to arrest after the arrestee has been handcuffed, they may search for evidence related to the arrest. This may be referred to as the “Scalia doctrine,” because it was he who proposed this approach to the search incident doctrine in a case decided several years ago.19 For example, if an occupant of a vehicle is arrested on an arrest warrant for drugs, presumably officers may search the vehicle for drugs.

There is no doubt that the burden will be on the state to establish the required nexus between the arrest and the evidence for which the officer was searching.

What that burden will be is anybody’s guess. Justice Stevens, in his majority opinion, described the apparent level of proof as “likelihood” in one paragraph and “might” be there in the next.20 Obviously, it will take some time and case law to determine what types of crimes will create the “likelihood” that evidence will be present in the vehicle or “might” be found in the vehicle.21

Another question that arises is, if the Scalia doctrine is adopted by Arizona courts, will it be limited to vehicle searches, or will it be expanded to all searches, including the search of premises? If so, what will the scope of such searches be? Will officers be permitted to search the room in which the arrest occurred? Will officers be permitted to search the entire house?

Finally, it will be argued by prosecutors that the “scope” of a vehicle search, under the Scalia doctrine, should now extend to the trunk. Under Belton, officers could search the passenger compartment of the vehicle, but could not search the trunk.22 Under the Scalia doctrine, there would be no justification for placing similar limitations on the scope of the search.

Will Arizona courts extend the Gant doctrine to premises and other areas?

It is easily foreseeable that defense counsel will urge judges to apply Gant to situations that do not involve vehicles. Will Arizona courts broaden the Gant doctrine to include virtually all situations where an arrestee is handcuffed, in effect creating another bright-line rule—that no search incident to arrest may proceed once the arrestee is handcuffed?

Arizona courts might well rule that, once an officer handcuffs an arrestee in his or her home, officers will not be permitted to conduct a search incident to the arrest.23

Prior Arizona case law provides an interesting illustration of this debate.

In 1976, approximately equidistant in time between Chimel and Belton, the Arizona Supreme Court was confronted by the Gant question (in the context of a motel room) in State v Noles.24 A suspect was lawfully arrested in his motel room for armed robbery and assault with a deadly weapon. The officers handcuffed Noles and then searched the nightstand drawer in the motel room. While four officers stood around the handcuffed suspect, an officer discovered two guns in the drawer.

The Arizona Supreme Court concluded that the search was constitutional under Chimel. In dissent, Justice Struckmeyer25 insisted that the search incident to arrest doctrine did not apply to searches conducted after the arrestee had been handcuffed. Justice Struckmeyer’s words were prescient of Justice Stevens’ language in Gant:

The asserted justification for searching the nightstand drawer was the danger that this man, who had his hands cuffed behind his back and was surrounded by four armed police officers, might gain possession of a weapon. I disagree with the majority’s conclusion that the nightstand was an area within his “immediate control” after Noles’ arrest and restraint. This ignores the reality of not only his restraint but the simple, unalterable fact that the only action necessary to conclude the arrest was to remove Noles from his room to a place of confinement.26

If Arizona courts rule that the Gant doctrine applies in circumstances other than vehicles, how far down that slippery slope will the courts go? How about an extreme example: An officer lawfully arrests a suspect, handcuffs him, and Shackles his handcuffs to a belt around his waist. The officer then searches the suspect’s sock and finds drugs. Will the drugs be suppressed under Gant if the suspect can prove that it would have been virtually impossible for him to reach his socks?27

The Dissent: May officers search if a vehicle occupant is not handcuffed?

Most attorneys have long forgotten that Miranda was a 5–4 decision. Does anyone remember the dissenting opinion? Is it ever cited?

Like Miranda, Gant was a 5–4 decision. Most attorneys who follow criminal procedure know that. But how many attorneys...
know what the dissent said? How many care? So what did the Gant dissenters have to say, besides the fact that the majority was wrong?

There is one thing that Justice Alito said in dissent, in a footnote, that may have salience and durability.

I do not understand the Court’s decision to [not] reach the following situations. First, it is not uncommon for an officer to arrest some but not all of the occupants of a vehicle. The Court’s decision in this case does not address the question whether in such a situation a search of the passenger compartment may be justified on the ground that the occupants who are not arrested could gain access to the car and retrieve a weapon or destroy evidence. Second, there may be situations in which an arresting officer has cause to fear that persons who were not passengers in the car might attempt to retrieve a weapon or evidence from the car while the officer is still on the scene. The decision in this case, as I understand it, does not address that situation either.28

What circumstances will courts consider in determining whether an arrestee can access the vehicle?
The officers searched Gant’s vehicle after he had been handcuffed and placed in the back seat of a patrol car. It seems obvious that even if the arrestee had just been handcuffed, but not placed in the patrol car, the result would have been the same. That’s an easy question.

But where will Arizona courts draw the line on access to the arrestee’s vehicle? What if the uncuffed arrestee is near the car, so that it is accessible, but conversing with four officers? How about three? How about two? How about one? What if the officer(s) are standing between the arrestee and his or her vehicle? What if the arrestee is instructed to sit on the curb near the car? The variables here seem legion. And Arizona courts will have to rule on all of them unless a bright-line rule is created.

Remember that in Belton, which is still good law, the four arrestees were (allegedly) left uncuffed on the four outside corners of the vehicle while the lone officer searched the passenger compartment.

If Arizona courts rule that the Gant doctrine applies in circumstances other than vehicles, how far down that slippery slope will the courts go?

Will officers leave arrestees uncuffed in order to search the vehicle?
The answer to this is yes. How often? Who knows? Will officers get killed? They will if they get careless, believing that obtaining evidence from the vehicle is more important than their safety.

Conclusion
Back in 1979, the Chief Justice of the United States stated in Arkansas v. Sanders: “We are construing the Constitution, not writing … a manual for law enforcement officers.”29

When the Court interprets the Constitution, officers are almost always left confused as to what they can and cannot do.

However, when the Court tries to create bright-line rules for officers, the rules almost always result in an “un-anchoring” of the reason from the holding, with ostensible rights inevitably violated.

Which result is better probably depends on whether, and by what, your ox is being gored.

Two things about Gant seem relatively certain.

One is the holding. Before Gant was decided, the vast majority of courts had interpreted Belton to mean that officers could always search passenger compartments incident to arrest, even after the arrestee had been handcuffed and placed in the back seat of the patrol car. States now will be required to revise their case law to comply with Gant.30

The second is that this case has created many questions that will have to be answered by case law, primarily by state and federal courts around the country. No one knows the answers to these questions.

But can we make some predictions? Of course! So, here goes:

1. Will Gant be applied to premises? Yes.
2. Will Gant be applied to the search of arrestees? No.
3. Will the Scalia doctrine be applied to vehicles? Yes.
4. Will the Scalia doctrine be applied to the trunks of cars? Probably not.
5. Will the Scalia doctrine be applied to premises? Probably not, but only because the courts would have so much trouble controlling the scope once allowed.
6. Will officers be permitted to search a vehicle under the Belton doctrine if there are uncuffed occupants outside the vehicle? Yes, if the circumstances show there was reasonable concern for officer safety or destruction of evidence.
endnotes
3. In some states, officers were even permitted to search locked containers in the passenger compartment under this theory. See, e.g., People v. Dieppa, 830 N.E.2d 870 (Ill. Ct. App. 2005), where the court held that, although the arrestee was handcuffed and secured in a patrol car, officers could search a locked glove box in the arrestee’s vehicle.
6. The Gant case actually began in 1999 and was first reviewed by the United States Supreme Court in 2003. The procedural twists and turns this case has taken since its inception are beyond the scope of this article.
8. 162 P.3d 640 (Ariz. 2007).
9. The Court of Appeals, with Judge Espinosa dissenting, reversed the superior court’s order denying Gant’s motion to suppress. The Arizona Supreme Court affirmed the Arizona Court of Appeals but vacated that court’s opinion. Justice Bales dissented, with Chief Justice McGregor concurring, concluding that, as long as Belton was the law, Arizona courts were required to follow it. Justice Bales encouraged the United States Supreme Court to “revisit” Belton. 162 P.3d at 650.
13. In the rare instance where a warrant is required, it is because the probable cause has existed for some time or the vehicle is parked on the defendant’s driveway, thereby taking on the expectations of privacy of the home. See Coolidge v. New Hampshire, 403 U.S. 443 (1971).
14. Consent may be obtained without explaining that the driver may refuse or leave. See Schneckloth v. Bustamonte, 412 U.S. 718 (1973), but consent granted during a traffic stop will probably be limited to the time it takes to write the traffic ticket. See, e.g., Illinois v. Caballes, 543 U.S. 405 (2004).
16. The exigency doctrine has, in large part, been supplanted by the automobile exception. See Texas v. White, 423 U.S. 67 (1975), which put the mobility prong to rest. In White, officers removed a vehicle to the station house and searched it at a later point in time. The Supreme Court determined that exigent circumstances did not exist, but that the probable cause remained. Therefore the search was constitutional.
17. Officers may typically inventory a vehicle if they have lawful custody of it and their departmental rules dictate the parameters of the search. See, e.g., Florida v. Wells, 495 U.S. 1 (1990).
18. These searches are very limited in number. See, e.g., New York v. Class, 475 U.S. 106 (1986), where the Court held that officers were justified in conducting warrantless VIN searches during traffic stops.
20. According to Justice Stevens: 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, 541 U.S., at 632, 124 S. Ct. 2127 (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., Arwater v. Lago Vista, 582 U.S. 318, 324, 121 S. Ct. 1536, 149 L.Ed.2d 549 (2001); Knowles v. Iowa, 525 U.S. 113, 118, 119 S. Ct. 484, 142 L.Ed.2d 492 (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. (Emphasis supplied.) Neither the possibility of access nor the likelihood of discovering offense-related evidence authorized the search in this case.
21. Because the arrests in Belton and Thornton were drug related, the Supreme Court, applying the Scalia doctrine, probably would find the evidence admissible.
22. 453 U.S. at 461. In Belton, the Court upheld a search of the passenger compartment of a vehicle, but carefully limited its holding in such fashion as to “not encompass the trunk” of the vehicle. 453 U.S. at 461, n.4. Presumably this is because, having been placed under arrest, the suspect is not in a position to gain access to the trunk of a vehicle.
23. Provided, of course, that at the same time Arizona courts choose not to adopt the Scalia doctrine to homes.
25. Justice Gordon concurred with Justice Struckmeyer on this issue.
27. In addition to other arguments in opposition to this position, the suspect obviously could be searched at the jail and therefore would likely be searchable under the inevitable discovery rule in any event.
28. 129 S. Ct. at 1719 (emphasis supplied).