THE EFFECT OF *ARIZONA V. GANT* ON PAST SEARCHES INCIDENT TO ARREST

Case Example from 11th Circuit
United States v. Davis

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©2010 Brian S. Batterton, Attorney, Legal & Liability Risk Management Institute, *United States v. Davis 08-16654, 2010 U.S. App. LEXIS 5131 (11th Cir. Decided March 11, 2010*.

In 1982, in the *United States v. Johnson*, the United States Supreme Court held that their decisions in construing the Fourth Amendment are to be applied retroactively to all convictions that were not final at the time their [the Supreme Court] decision was rendered.[i] This rule has come into play recently in light of the high Court's 2009 decision in *Arizona v. Gant*[ii], which changed the way police are to apply the motor vehicle search incident to arrest rule from *New York v. Belton*.[iii] As a reminder, in *Belton* the Court held that a police officer may search the passenger compartment of motor vehicle, and the contents of containers therein, incident to the lawful arrest of a vehicle occupant. Since 1981, this rule has been interpreted by courts across the country to mean that police could search a vehicle incident to arrest even when the arrestee no longer had actual control over the passenger compartment (i.e.: the arrestee was handcuffed and in the back seat of a police car]. Then in 2009, in *Arizona* v. *Gant*, the Supreme Court held that

> **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 it is reasonable to believe the vehicle contains evidence of the offense of arrest**.[iv]

Thus, in *Gant,* the Supreme Court modified the *application* of the search incident to arrest rule that was established in *New York v. Belton*.

The Eleventh Circuit Court of Appeals recently decided the *United States v. Davis*[v], which illustrates the various outcomes that *Gant* may have on searches of motor vehicles incident to arrest that took

place prior the decision in *Gant*. In *Davis*, in 2007, an officer in Alabama arrested a driver for DUI. Another officer asked the passenger of the vehicle his name. The passenger replied "Ernest Harris." The officer noticed this passenger was fidgeting with his jacket and smelled of alcohol. The officer had the passenger exit the vehicle, and as he did so, he took off his jacket and left it in the car. The officer then checked the passenger for weapons and took him to the back of the car where the officer asked some bystanders if "Ernest Harris" was his real name. The bystanders said that the passenger's real name was Davis. Using the correct name and date of birth, the officer was able to verify his true identity with the police dispatcher. The officer then arrested the passenger, Willie Davis, for providing a false name. He was handcuffed and secured in a police car; the driver, who had been arrested for DUI was secured in another police car.

The officer then went to the car, removed Davis' jacket and searched it incident to his arrest, in accordance with *New York v. Belton*. The officer discovered a revolver. Davis was ultimately charged under federal law for the unlawful firearm possession.[vi] At a motion to suppress, Davis conceded that the search incident to arrest was lawful under existing court precedent (*New York v. Belton*). However, *Arizona v. Gant* was pending so Davis preserved the issue for appeal. Davis was convicted.

Then, after the holding in *Arizona v. Gant*, Davis filed his appeal to the Eleventh Circuit Court of Appeals. There were two issues before the court. First, the court had to decide *whether the search incident to arrest violated the Fourth Amendment, in light of Arizona v. Gant.* Second, if the search violated the *Fourth Amendment*, the court had to determine *whether the exclusionary rule mandated suppression of the evidence (the gun) found during the search*.

ISSUE ONE:

Did the search incident to arrest of Davis' jacket that was located in the vehicle violate the *Fourth Amendment* in light of *Arizona v. Gant*?

In *Arizona v. Gant*, Gant was arrested for driving with a suspended license. He was arrested approximately 10-12 feet away from his car. He was handcuffed and placed in the back seat of a patrol car at which time the police searched his vehicle incident to his arrest. They found cocaine in a jacket located on the back seat of Gant's vehicle. The United States Supreme Court held

> 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 it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.[vii]

Gant was not within reaching distance of his car at the time of the search. Further, it was not reasonable to believe evidence related to the crime of arrest (suspended license) would be in car.

Therefore, the Court held the search of Gant's passenger compartment incident to arrest violated the *Fourth Amendment*.

Similarly, the Eleventh Circuit Court of Appeals noted in *Davis*, that both Davis and the arrested driver were handcuffed and secured in police cars at the time of the search. The court also noted that Davis was arrested for "an offense for which police could not expect to find evidence in the passenger compartment."[viii] This was because the officer had already verified Davis' identity when he arrested him for providing a false name. **Thus, the Eleventh Circuit held that Davis' *Fourth Amendment* rights were violated by the search incident to arrest of his jacket that was removed from the passenger compartment after his arrest.**

Issue Two:

Did the exclusionary rule mandate suppression of the evidence (the gun) found during the search?

The Eleventh Circuit, in examining case law from other federal circuits, noted that there is a split of opinion on this issue. For example, in the *United States v. Gonzalez*[ix], the Ninth Circuit held that, because Gant benefitted from the decision in his case, other defendants in non-final similar cases should also benefit. Thus, the Ninth Circuit suppressed evidence under the exclusionary rule, in light of the holding in *Gant*. In contrast, the Tenth Circuit, in the *United States v. McCane*[x], applied the "good faith exception" to the exclusionary rule in a case that involved a *Fourth Amendment* violation based on *Gant*.

The Eleventh Circuit also noted that, in a case unrelated to *Gant*, the Fifth Circuit applied the good faith exception to the exclusionary rule when police relied on case law that was later overturned as a basis for a search.[xi] Similarly, the First Circuit also applied the good faith exception regarding a warrant that was issued when inter-circuit case law regarding the issuance of the warrant was not clear.[xii] However, it was also observed that the Seventh Circuit "expressed skepticism" regarding the application of the good faith exception when police relied solely on case law in performing a search.[xiii]

The "good faith exception," as a reminder, came from the United States Supreme Court's decision in the *United States v. Leon*.[xiv] In *Leon*, officers prepared a search warrant affidavit and presented it to a judge, who believed probable cause was present. The judge approved the search warrant and the officers executed it, finding a large quantity of drugs. Later, an appellate court ruled that the search warrant affidavit was insufficient to establish probable cause. The Supreme Court held that the exclusionary rule should not apply when officers act in good faith reliance on a search warrant issued by a neutral and detached magistrate.

Now back to the case at hand. The Eleventh Circuit Court of Appeals noted that the Supreme Court created the exclusionary rule to deter improper police conduct. In their review of *Leon* they stated

> First, the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates. Second, there exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the *Fourth Amendment* or that lawlessness among these actors requires application of the extreme sanction of exclusion. Third, and most important, we discern no basis, and are offered none, for believing that exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect on the issuing judge or magistrate.[xv]

They also noted that the exclusionary rule was not an individual right, but rather a court-made rule. Further, in 2009, in *Herring v. United States*, the Supreme Court, considering the exclusionary rule, stated

> Whether to suppress evidence obtained from an unconstitutional search thus "turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct.[xvi]

The Eleventh Circuit cited to numerous cases where the exclusionary rule has not been applied in circumstances where the police acted *reasonably,* and its application would *not have been a deterrent* to improper police conduct. The court stated

> The Court has gradually expanded this good-faith exception to accommodate objectively reasonable police reliance on: subsequently invalidated search warrants, *Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677; subsequently invalidated statutes, *Illinois v. Krull*, 480 U.S. 340, 107 S. Ct. 1160, 94 L. Ed. 2d 364 (1987); inaccurate court records, *Arizona v. Evans*, 514 U.S. 1, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995); and negligently maintained police records, *Herring*, 129 S. Ct. 695, 172 L. Ed. 2d 496. In each of its decisions expanding the exception, the Court has concluded that the unlawful police conduct at issue was neither "sufficiently deliberate that exclusion [could] meaningfully deter it" nor "sufficiently culpable that such deterrence [would be] worth the price paid by the justice system." *Herring*, 129 S. Ct. at 702.[xvii]

In applying the above principals and precedent to the facts of *Davis*, the court noted that the officer that searched Davis' jacket did not intentionally violate his constitutional rights.[xviii] At the time of Davis' search, the officer relied on a broad interpretation of the rule in *Belton* that was supported by the Eleventh Circuit and many other courts across the country. As such, the court stated that the officer cannot be held responsible for the unlawfulness of the search, as officers are entitled to rely on court precedent. Thus, the court reasoned that applying the exclusionary rule in *Davis* would have little deterrent effect on law enforcement. The Eleventh Circuit went on to state

> Although an officer's mistake of law cannot provide objectively reasonable grounds for a search, the mistake of law here was not attributable to the police. On the contrary, the governing law in this circuit unambiguously allowed [the officer] to search the car.

> Relying on a court of appeals' well-settled and unequivocal precedent is analogous to relying on a statute… **Because the search was objectively reasonable under our then-binding precedent, suppressing the gun found in Davis's jacket would serve no deterrent purpose. In accordance with our holding that the good-faith exception allows the use of evidence obtained in reasonable reliance on well-settled precedent, we refuse to apply the exclusionary rule here**.[xix] [internal citations omitted]

Thus, the court held that the search of Davis' jacket that was removed from the vehicle and searched incident arrest was an unconstitutional search in light of Gant, but they refused to apply the exclusionary rule to the gun that was found in the jacket, relying on the good faith exception to the exclusionary rule. Therefore, Davis' conviction was affirmed.

Authors note: Some states, based on state statute or the state constitution, may not recognize the good faith exception to the exclusionary rule. If in doubt as to the application of the good faith exception in your jurisdiction, seek the opinion of your local prosecutor. Further, this exception, if recognized by your jurisdiction, would only apply to searches that took place before the Supreme Court's ruling in *Gant*, not searches that take place after *Gant*.

CITATIONS:

[i] 457 U.S. 537, 562 (1982)
[ii] 129 S.Ct. 1720 (2009)
[iii] 453 U.S. 454 (1981)
[iv] 129 S.Ct. at 1729
[v] No. 08-16654, 2010 U.S. App. LEXIS 5131 (11th Cir. Decided March 11, 2010)
[vi] 18 U.S.C. §922(g)(1)
[vii] 129 S.Ct. 1720 (2009)
[viii] *Davis* at 7
[ix] 578 F.3d 1130 (9th Cir. 2009)
[x] 573 F.3d 1037 (10th Cir. 2009)
[xi] *United States v. Jackson*, 825 F.2d 853 (5th Cir. 1987)
[xii] *United States v. Brunette*, 256 F.3d 14 (1st Cir. 2001)
[xiii] *United States v. 15324 County Highway E.*, 332 F.3d 1070 (7th Cir. 2003)
[xiv] 468 U.S. 897 (1984)
[xv] *Davis* at 14 (citing Leon, 468 U.S. at 916)
[xvi] *Davis* at 12 (quoting Herring v. United States, 129 S.Ct. 695, 698 (2009))
[xvii] *Id*. at 13
[xviii] *Id*. at 14
[xix] *Id.* at 19-20