[Cite as *State v. Price*, 2013-Ohio-130.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

State of Ohio

Appellant

v.

Lawrence E. Price, II

Appellee

Court of Appeals No. S-11-037

Trial Court No. 10 CR 1400

DECISION AND JUDGMENT

Decided: January 18, 2013

* * * * *

Thomas L. Stierwalt, Sandusky County Prosecuting Attorney, for appellant.

John M. Felter, for appellee.

* * * * *

HANDWORK, J.

{¶ 1} This case is before the court on appeal from the judgment of the Sandusky County Court of Common Pleas which granted the motion to suppress filed by appellee, Lawrence E. Price, II, on the basis that the warrantless search of the vehicle, in which appellee was riding, did not fall within the search incident to arrest exception or the

automobile exception to the Fourth Amendment's warrant requirement. The state of Ohio appeals the August 30, 2011,[1] decision of the trial court and states as its sole assignment of error that "[t]he trial court erred in granting defendant-appellee's motion to suppress evidence based upon the holding of the United States Supreme Court in *Arizona v. Gant*, [556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009)]."

{¶ 2} Appellate review of a motion to suppress is set forth in *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8, wherein the Ohio Supreme Court stated that

> Appellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. *State v. Mills*[, 62 Ohio St.3d 357, 366, 582 N.E.2d 972 (1992)]. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Fanning*[, 1 Ohio St.3d 19, 437 N.E.2d 583 (1982)]. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard. *State v. McNamara*[, 124 Ohio App.3d 706, 707 N.E.2d 539 (1997)].

[1] The judgment entry was journalized on August 31, 2011.

{¶ 3} This matter arose as a result of a traffic stop in a McDonald's parking lot on September 22, 2010, in which Sergeant Thomas Gerhardt[2] pulled over a vehicle, driven by Tyrone Ervin, for speeding. Appellee was the only passenger in the vehicle. Ervin told Sgt. Gerhardt that he did not have a driver's license with him, but gave his Social Security number and date of birth. After running Ervin's name through the patrol vehicle's on-board computer, Sgt. Gerhardt determined that there was a pick-up warrant for Ervin. The warrant was under the name "Charles Ervin," but since Sgt. Gerhardt did not know exactly who he had, he placed Ervin in handcuffs, patted him down, found $1,175 in cash, smelled the odor of burnt marijuana on Ervin's person and inside the vehicle, and detected an odor of an alcoholic beverage on Ervin's person. After conducting a field sobriety test, Sgt. Gerhardt determined Ervin was over the limit for OVI and placed him in the back of the patrol car. Sgt. Gerhardt found out that he actually had Tyrone Ervin, not Charles Ervin, but determined that Tyrone also had a warrant out of Lucas County, which was for pick-up only in Lucas County.

{¶ 4} After placing Ervin in the patrol vehicle, Sgt. Gerhardt asked Ervin if appellee, the passenger, had permission to drive the vehicle. Ervin agreed that appellee could drive the vehicle home; however, the car was not registered to Ervin or appellee. Sgt. Gerhardt got appellee out of the vehicle, told him that he was not under arrest, and stated that he was just making sure that appellee was not under the influence so that he

[2] We note various spellings of the sergeant's name throughout the briefs. The transcript of the suppression hearing shows his name as "Gerhardt." We are obliged to follow the record.

could drive the vehicle home. Sgt. Gerhardt noted that appellee was "very fidgety, very nervous, couldn't stand still, shuffling his feet, kept moving his hands around." Appellee was given a "soft pat-down" and it was determined that there were no weapons on him. Sgt. Gerhardt began the field sobriety test and noted that appellee "continued to act really nervous and fidgety." Sgt. Gerhardt testified that he "asked him if he was sure he didn't have anything on him, [and appellee] said, well, I'll empty out my pockets." As he was emptying his pockets, appellee "pulled out a piece of cellophane plastic wrapper and placed it on the trunk of the vehicle." Sgt. Gerhardt stated that cellophane wrappers are associated with carrying some sort of contraband or drugs. When asked what it was, appellee told Sgt. Gerhardt, "that's nothing, that's a piece that I didn't smoke earlier" and started to reach for it. Appellee was then arrested "under the suspicion of having some sort of drugs or something with that cellophane." Appellee was placed in handcuffs and put into a separate patrol vehicle from Ervin.

{¶ 5} Because of the odor of burnt marijuana, the large amount of cash in Ervin's pocket, and appellee's statement concerning the piece of cellophane wrapper being from something he "didn't smoke earlier," Sgt. Gerhardt believed that another crime was being committed, e.g., that there may be more marijuana in the vehicle. Sgt. Gerhardt then searched the front seat of the vehicle and found a small bag of marijuana between the front console and the passenger seat. He continued with the search of the vehicle and found a black bag in the back seat that smelled of marijuana, but had no seeds or stems in it. He then checked the trunk, wherein he found "a black plastic bag with digital scales

sitting on top of it." Sgt. Gerhardt testified that by feeling the outside of the black plastic bag, he determined that the contents were consistent with "vegetative matter," and stated that the trunk had a "very high odor of green marijuana."

{¶ 6} After smelling the burnt marijuana and finding a large amount of cash on the driver, a small amount of marijuana in between the console and the passenger seat, and a black bag that smelled of marijuana, Sgt. Gerhardt called for a tow truck to impound the vehicle in a certified police tow lot before searching the trunk. On cross-examination, Sgt. Gerhardt testified that, when a misdemeanor amount of marijuana is found in the vehicle, it is his custom to search the entire vehicle, including the trunk. Sgt. Gerhardt also testified that it was his policy or customary procedure to conduct an inventory search of the vehicle prior to it being towed. On re-direct, Sgt. Gerhardt reiterated that the Woodville Police Department routinely does an inventory search of a vehicle before it is towed from a scene.

{¶ 7} The defense established that, at the time of the search of the vehicle, including the trunk, both Ervin and appellee were in patrol vehicles and had no access to the vehicle Ervin had been driving. Further, because of the odor of burnt marijuana, Sgt. Gerhardt concluded that appellee could be under the influence and, therefore, was not a candidate for driving the vehicle home.

{¶ 8} Upon hearing the testimony and arguments of counsel, the trial court sustained the motion to suppress, stating that it "[s]eems to me that any exigent circumstance evaporated when both defendants were separated and both were in separate

cruisers. The evidence isn't going to go anywhere." As the evidence found in the trunk was considered inadmissible, the state appealed the decision of the trial court.

{¶ 9} The Fourth Amendment to the United States Constitution requires adherence to judicial processes and proscribes all unreasonable searches and seizures. *U.S. v. Ross*, 456 U.S. 789, 825, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982). It is a cardinal principle that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions." (Footnotes omitted.) *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

{¶ 10} One such exception to the warrant requirement is the search incident to a lawful arrest as recognized by *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). "The exception derives from interests in officer safety and evidence preservation." *Id.* at 338. According to *Gant,* a search incident to a lawful arrest is permitted "when an arrestee is within reaching distance of the vehicle or it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Id.* at 346. Reasonableness "is measured in objective terms by examining the totality of the circumstances." *Ohio v. Robinette*, 519 U.S. 33, 39, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996). "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." *Gant* at 351.

{¶ 11} In *Gant*, the defendant was arrested for driving on a suspended license, was handcuffed and locked in a patrol car before officers searched his vehicle. The United States Supreme Court found that the warrantless search of Gant's vehicle was unreasonable and did not fall within the search-incident-to-arrest exception because Gant was not within reaching distance of the passenger compartment at the time of the search and it was not reasonable for the officers to believe that Gant's vehicle would contain evidence regarding the offense of driving on a suspended license.

{¶ 12} Another exception to the warrant requirement is the automobile exception as set forth in *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). The exception is one that is found by the United States Supreme Court to be "specifically established and well delineated." *United States v. Ross*, 456 U.S. 798, 825, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982). In *Carroll*, the court held that a warrantless search of an automobile stopped by law enforcement officers who had probable cause to believe the vehicle contained contraband was not unreasonable under the Fourth Amendment. *Carroll* at 155-156. Probable cause exists where there is "a reasonable ground for belief of guilt" based upon the facts known to the officer. *Id.* at 161.

{¶ 13} The reasons for allowing for warrantless searches of vehicles where probable cause exists pursuant to the automobile exception is twofold. "First, the inherent mobility of automobiles creates circumstances of such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible." *South Dakota v. Opperman*, 428 U.S. 364, 367, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976),

citing *Carroll* at 153-154, and *Coolidge v. New Hampshire*, 403 U.S. 443, 459-460, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). Second, "less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office." *Opperman* at 367.

{¶ 14} Previously, only where exigent circumstances were found would "the judgment of the police as to probable cause serve as a sufficient authorization for a search." *Chambers v. Maroney*, 399 U.S. 42, 51, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1975). Nevertheless, the United States Supreme Court held that "unless the Fourth Amendment permits a warrantless seizure of the car and the denial of its use to anyone until a warrant is secured," the vehicle's mobility is still an exigent issue. *Id.* at 52. This is true even if no immediate danger is presented that the car would be removed from the jurisdiction, such as, when the vehicle has been moved to the station house prior to the search being conducted. *Id.* The court stated in *Chambers*:

> For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.

{¶ 15} Despite the apparent requirement that exigent circumstances existed in order for the automobile exception to apply, the United States Supreme Court later clarified that under its "established precedent, the 'automobile exception' has no separate

exigency requirement." *Maryland v. Dyson*, 527 U.S. 465, 466-467, 119 S.Ct. 2013, 144 L.Ed.2d 442 (1999). In *Dyson*, the court stated,

> We made this clear in *United States v. Ross*, 456 U.S. 798, 809, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982), when we said that in cases where there was probable cause to search a vehicle "a search is not unreasonable if based on facts that would justify the issuance of a warrant, *even though a warrant has not been actually obtained*." (Emphasis added.)
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> * * *
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> In this case, the Court of Special Appeals found that there was "abundant probable cause" that the car contained contraband. This finding alone satisfies the automobile exception to the Fourth Amendment's warrant requirement * * *. The holding of the Court of Special Appeals that the "automobile exception" requires a separate finding of exigency in addition to a finding of probable cause is squarely contrary to our holdings in *Ross* and *Pennsylvania v. Labron*, 518 U.S. 938, 116 S.Ct. 2485, 135 L.Ed.2d 1031 (1996).

{¶ 16} Although there is no separate exigency requirement, the scope of a warrantless search of an automobile based upon probable cause may nevertheless be limited. "After an officer has probable cause to believe that a vehicle contains contraband, a permissible search of the vehicle 'is defined by the object of the search and the places in which there is probable cause to believe that it may be found.'" *State v. Gonzales*, 6th Dist. No. WD-07-060, 2009-Ohio-168, ¶ 17, citing *United States v. Ross*,

456 U.S. 798, 824, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982). Thus, for example, the "odor of burnt marijuana in the passenger compartment of a vehicle does not, standing alone, establish probable cause for a warrantless search of the trunk of a vehicle." *State v. Farris*, 109 Ohio St.3d 519, 2006-Ohio-3255, 849 N.E.2d 985, ¶ 52. "This proposition is established by the common sense observation that an odor of burning marijuana would not create an inference that burning marijuana was located in a trunk." *Gonzales* at ¶ 21. However, where an officer detects a strong odor of raw marijuana, but no large amount is found within the passenger compartment of the vehicle, the officer has probable cause to search the trunk. *Gonzales*, *supra*. Hence, "[i]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." *Ross* at 825.

{¶ 17} In this case, we find that Sgt. Gerhardt's search of the passenger compartment of the vehicle without a warrant was permissible pursuant to the search incident to a lawful arrest exception to the warrant requirement of the Fourth Amendment. *See Gant,* 556 U.S. at 346, 129 S.Ct. at 1721. Based upon the odor of burnt marijuana, the large amount of cash in Ervin's pocket, and appellee's statement concerning the piece of cellophane wrapper being from something he "didn't smoke earlier," we find that, based upon a totality of the circumstances, Sgt. Gerhardt had a reasonable belief that the vehicle contained further evidence of the offense of arrest, to wit drug use or sale by appellant and/or Ervin. *Id.*

{¶ 18} Upon searching the passenger compartment, Sgt. Gerhardt found a small amount of marijuana and a black bag that smelled of marijuana. We find that the totality of the circumstances establish that Sgt. Gerhardt had probable cause to search the trunk of the vehicle pursuant to the automobile exception to the warrant requirement. *See Carroll*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543, and *Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572. Contrary to appellee's argument and the finding of the trial court, no exigent circumstances of mobility of the vehicle had to be established in order for the automobile exception to apply. *See Dyson*, 527 U.S. 465, 119 S.Ct. 2013, 144 L.Ed.2d 442.

{¶ 19} Additionally, we find that this case is distinguishable from *Farris*, 109 Ohio St.3d 519, 2006-Ohio-3255, 849 N.E.2d 985, because the odor of burnt marijuana was not the only factor upon which Sgt. Gerhardt could rely in determining that he had probable cause to search the trunk. Rather, there was the odor of burnt marijuana, a large amount of cash on Ervin, Ervin had no driver's license on his person, appellee appeared excessively nervous, appellee's statement about "smoking" something earlier that came out of a cellophane wrapper, actual marijuana found in the passenger compartment of the vehicle, and a bag with the smell of marijuana found in the passenger compartment. As such, we find that this case is similar to cases where other evidence, in addition to the odor of burnt marijuana, established probable cause to allow the officer to search the entire vehicle, including the trunk, pursuant to the automobile exception to the warrant requirement. *See, e.g., State v. Greenwood*, 2d Dist. No. 19820, 2004-Ohio-2737 (officer

observed marijuana on the passenger seat and floorboard); *State v. Whatley*, 5th Dist. No. 10-CA-93, 2011-Ohio-2297 (officer found marijuana in the passenger compartment of the car in plain view, was given a false name by defendant, and the driver made an attempt to get into the trunk as she was walking toward the officer's cruiser); and *State v. Griffith*, 2d Dist. No. 24275, 2011-Ohio-4476 (officer found marijuana in plain view in the passenger compartment, defendant was in a parking lot where high occurrences of drug activity were known to occur, and defendant drove evasively from officer).

{¶ 20} Upon review of the record and applicable law, we agree with the state that a warrantless search of the vehicle did not violate appellee's constitutional rights. The state's sole assignment of error is therefore found well-taken. Accordingly, we find that the trial court erred in concluding that Sgt. Gerhardt lacked probable cause to search the vehicle without a warrant on the basis that no exigent circumstances concerning the vehicle's mobility existed once Ervin and appellee were placed in the cruisers.

{¶ 21} On consideration whereof, this court finds that the judgment of the Sandusky County Court of Common Pleas, granting appellee's motion to suppress the evidence, is reversed. This matter is remanded to the trial court for further proceedings consistent with this decision. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _______________________________
JUDGE

Mark L. Pietrykowski, J.
CONCUR. _______________________________
JUDGE

Stephen A. Yarbrough, J.
CONCURS AND WRITES SEPARATELY. _______________________________
JUDGE

YARBROUGH, J.

{¶ 22} I concur in judgment. I write separately to emphasize certain points because this is a closer case than it might appear.

{¶ 23} The record from the suppression hearing indicates that Sgt. Gerhardt lawfully stopped a vehicle containing two individuals for a traffic violation. He found

that the driver, Ervin, was wanted on an outstanding warrant and ordered him out of the car. Gerhardt smelled the distinct odor of "burnt marijuana" on Ervin and the same odor coming from the passenger compartment. Because Ervin also exhibited symptoms of insobriety, Gerhardt had him perform a field sobriety test, which he failed. Ervin was then arrested, handcuffed and patted down, and placed inside Gerhardt's police cruiser. At that point the matter of disposing of the vehicle arose. Ervin told Gerhardt that Price, the passenger and appellee herein, could drive the car from the scene.

{¶ 24} Gerhardt then approached Price, still seated in the car, and ordered him out for the purpose of determining his sobriety level and, thus, whether he could lawfully drive. Price was fidgety and nervous, apparently making furtive movements in proximity to Gerhardt, so the officer gave Price "a soft pat-down" for weapons. Finding none, he asked Price to do a field sobriety test. As Price still appeared nervous, Gerhardt ask if he had anything else in his pockets. It was at this point that Price removed "a cellophane plastic wrapper" and laid it on the trunk of the car. In Gerhardt's experience this material was associated with contraband and drug usage, although no marijuana (or other) residue was apparent on its surface. The officer then asked what the wrapper was for, to which Price responded with the incriminating statement, "that's nothing, that's a piece that I didn't smoke earlier." Price was then arrested, according to Gerhardt, for "suspicion of having some sort of drugs or something with that cellophane." He handcuffed Price and put him in a second cruiser that had arrived at the scene.

{¶ 25} Gerhardt decided to impound the car and called for a tow truck. While waiting for the tow truck, Gerhardt commenced to search the passenger compartment of the car, starting in the front seat area. There he found a small bag of marijuana between the console and the passenger seat. He next searched the backseat where he found a black bag that smelled like marijuana. Using the keys he took from Ervin, he then opened the trunk and instantly smelled a "very high odor of green marijuana" and saw "a black plastic bag with digital scales sitting on top." Gerhardt ran his hand over the bag and felt that it held "vegetative matter" consistent with marijuana.

{¶ 26} In appealing the trial court's order suppressing the contraband Gerhardt found in the vehicle, the state's assigned error claims the court incorrectly applied the modified search incident to arrest doctrine announced in *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). Rather, the state argues, the officer's search of the vehicle was fully permissible under the "automobile exception," citing *United States v. Ross,* 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982). In my view, *Gant* applies, but it needs to be read and applied very carefully.

{¶ 27} In *Gant*, the United States Supreme Court found the officer's search of the vehicle's passenger compartment, following the lawful arrest of the driver, to be improper "[b]ecause police could not reasonably have believed *either* [1] that Gant could have accessed his car at the time of the search *or* [2] that evidence of the offense for which he was arrested [i.e., driving on a suspended license] might have been found therein[.]" (Emphasis added.) *Id.* at 344.

{¶ 28} For the first justification, the court made it clear that "police [are authorized] to search a vehicle incident to a recent occupant's arrest *only* when the arrestee is unsecured *and* within reaching distance of the passenger compartment at the time of the search." (Emphasis added.) *Id*. at 343. In so holding, the court modified *New York v. Belton,* 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), which had first applied to vehicle searches the "search incident to arrest" doctrine announced in *Chimel v. California,* 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). Incident to a lawful arrest, police may search the arrestee's person and "the area within his immediate control"—the scope of which is circumscribed by the lunge/reach principle, i.e., the area from within which the arrestee might lunge "to gain possession of a weapon" or reach to destroy items of evidence. *Chimel* at 763-64.

{¶ 29} *Belton* had taken *Chimel's* "area within the arrestee's immediate control" and extended it to the passenger compartment of an automobile whose recent occupants had been lawfully arrested. It is imperative, however, to understand why *Belton*'s holding was modified by *Gant*. In *Belton*, a lone officer had arrested Belton and three passengers for a drug offense. They had been ordered out of the car, but having only one set of handcuffs the officer did not restrain them. Instead, he ordered the four men to stand apart from each other, although they remained near the vehicle while he searched the passenger compartment. *Belton* at 456. On these facts, the Supreme Court upheld the search, reasoning "that articles [and containers] inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably,

within ‘the area into which an arrestee might reach.’” *Id.* at 460. Consistent with *Chimel’s* physical-proximity rationale, the scope of the search allowed was specifically limited “[to] the interior of the passenger compartment * * * and *does not* encompass the trunk.” (Emphasis added.) *Id.* at 460, fn. 4.

{¶ 30} In *Gant,* the Supreme Court revisited *Belton* because lower courts had read it too broadly as authorizing a vehicle search “incident to *every* arrest of a recent occupant notwithstanding that in most cases the vehicle’s passenger compartment will not be within the arrestee’s reach at the time of the search.” *Gant*, 556 U.S. at 343. Gant, the driver, was the only occupant of the vehicle. Arrested for driving with a suspended license, he was handcuffed and, like Ervin and Price here, placed in the officer’s vehicle. *Belton’s* physical-proximity rationale for searching the passenger compartment was factually absent in *Gant*, just as it is absent in this case. Consequently, Gerhardt’s search of the passenger compartment here, after Ervin and Price were handcuffed and moved into police cruisers, cannot be upheld on that rationale.

{¶ 31} Gerhardt’s search, however, is nonetheless constitutionally sustainable because “it [was] reasonable [for him] to believe evidence relevant to the crime of [Price’s] arrest might be found in the vehicle.” *Thornton v. United States,* 541 U.S. 615, 632, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004) (Scalia, J., concurring). That alternate justification, adopted in *Gant* but found inapplicable to Gant’s suspended-license offense, is completely unrelated to a search based on *Belton’s* “lunge-reach” proximity. Although

Gant joined both justifications under the rubric of "search incident to arrest," the two differ significantly in application and should not be confused.[3]

{¶ 32} For the second justification, the Supreme Court might have said "probable cause," an existing standard for warrantless vehicle searches. Instead, "for reasons unique to the vehicle context," the court chose the "reasonable to believe" language from Justice Scalia's concurring opinion in *Thornton*. *Gant* at 343. That standard appears closer to "reasonable suspicion" than to probable cause and, if present at all, it arises directly from the type of crime that prompted the arrest. It is not merely "reason to believe" that contraband or evidence of *any* crime is in the vehicle, but rather it is specifically linked to "evidence relevant to the crime of arrest." That specificity appears to exclude evidence of *other* crimes. Notably, in *Thornton,* as with Price here, the arrest was for a drug offense. Arrests for completed traffic offenses, as in *Gant*, would not entail a reasonable belief that additional evidence relevant to that offense would be found in the vehicle. Over time this new standard may prove to be the proverbial "camel's nose under the tent" in vehicle search cases. *See, e.g., Megginson v. United States,* 129 S.Ct.

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[3] Later in the opinion, the *Gant* court reiterated its new two-part rule as: "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." (Emphasis added.) *Gant,* 556 U.S. at 351. Importantly, these alternate justifications differentiate between the *scope* of a search based on one or the other. The first, consistent with the lunge/reach principle, limits the search to the passenger compartment; the second extends to "the vehicle."

1982, 173 L.Ed.2d 1288 (Mem) (2009) (Alito, J., dissenting, calling *Gant's* alternate justification "the reasonable suspicion requirement"); *United States v. Vinton* 594 F.3d 14, 25, 389 (D.C.Cir.2010) ("'[*Gant's*] reasonable to believe' standard probably is akin to the 'reasonable suspicion' standard required to justify a *Terry* search"); *State v. Cantrell*, 149 Idaho 247, 252, 233 P.3d 178 (Idaho App.2010) (*Gant's* "reasonable to believe" standard does not equate to a probable cause standard).[4]

{¶ 33} Interestingly, in adopting *Thornton's* justification for this sort of arrest-related evidentiary search, *Gant* took pains to distinguish other vehicle-search doctrines that are justified "*under additional circumstances* when safety or evidentiary concerns demand." (Emphasis added.) *Gant,* 556 U.S. at 346-347. This included, for example, a "frisk" of the passenger compartment for weapons, where reasonable suspicion exists that a recent occupant is "dangerous" and might access the vehicle to "gain immediate control of weapons" (citing *Michigan v. Long,* 463 U.S. 1032, 1049, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983)), and probable-cause searches under the *Ross-Acevedo* cases.[5] *Id.* Those

[4] *See also State v. Gamboa*, Ariz. App. No.CR-09-0517, 2010 WL 2773359 (July 13, 2010) fn. 4 ("While trying to parse the language of *Gant* may be analogous to divining the future based on examining the entrails of dead birds, we are not alone in trying to determine what the reasonable basis test really means." Citations omitted.)

[5] *See United States v. Ross, supra*, 456 U.S. at 820-821 (probable cause to believe a vehicle contains evidence of criminal activity authorizes a search of any area of the vehicle, including containers, in which the evidence sought might be found) and *California v. Acevedo*, 500 U.S. 565, 570 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991).

search justifications, and others, like consent or exigent circumstances, were held inapplicable to *Gant's* facts.

{¶ 34} Consistent with *Gant's* "reasonable to believe" justification, the facts here supported Gerhardt's search of the passenger compartment following *Price's arrest*. At least for drug offenses in which the arrestee is a recent occupant of the vehicle, and on whose person *some* evidence of drug use or possession is discovered during the stop, it is not unreasonable to believe that more such contraband might be found where he was last seated or in the nooks and crannies nearby—its scope being tied to "evidence relevant to [that] crime." *Gant,* 556 U.S. at 343.

{¶ 35} However, Gerhardt's further search of the trunk must be assessed in light of *State v. Farris*, 109 Ohio St.3d 519, 2006-Ohio-3255, 849 N.E.2d 985, which preceded *Gant.*

{¶ 36} In *Farris*, the Ohio Supreme Court explicitly stated that "Section 14, Article I of the Ohio Constitution provides greater protection than the Fourth Amendment to the United States Constitution" in certain contexts, *id*. at ¶ 47, citing *State v. Brown,* 99 Ohio St.3d 323, 2003-Ohio-3931, 792 N.E.2d 175. Relevant here, that protection relates to the *scope* of a warrantless vehicle search prompted by the detection of an odor of burnt marijuana, where validity is claimed under either the search incident to arrest exception or the "automobile exception." Regarding both, the *Farris* court held:

> [T]he [state] argues that, even without Farris's statements, [the officer] had probable cause to believe that the car contained contraband *due*

to his detection of the scent of marijuana and that the automobile exception to the warrant requirement permitted him to search the vehicle. * * * However, the items seized are admissible only if [the officer] had the authority to search the *trunk* of Farris's vehicle and its contents based upon the scent of marijuana. This court *did not* extend the search of the vehicle to the trunk in [*State v. Moore,* 90 Ohio St.3d 47, 734 N.E.2d 804 (2000)], and we decline to do so here.

A trunk and a passenger compartment of an automobile are subject to *different standards of probable cause* to conduct searches. In *State v. Murrell* (2002), 94 Ohio St.3d 489, 764 N.E.2d 986, syllabus, this court held that "[w]hen a police officer has made *a lawful custodial arrest of the occupant* of an automobile, the officer may, *as a contemporaneous incident of that arrest, search the passenger compartment* of that automobile." (Emphasis added.) The court was conspicuous in *limiting* the search to the passenger compartment.

The odor of burnt marijuana in the passenger compartment of a vehicle does not, *standing alone*, establish probable cause for a warrantless search of the trunk of the vehicle. *United States v. Nielsen* (C.A.10, 1993), 9 F.3d 1487. *No other factors justifying a search beyond the passenger compartment were present in this case.* The officer detected only a light odor of marijuana, *and the troopers found no other contraband within the*

passenger compartment. The troopers thus lacked probable cause to search the trunk of Farris's vehicle. Therefore, the automobile exception does not apply in this case. (Some citations omitted; emphasis sic and added.) *Id.* at ¶ 50-52.[6]

{¶ 37} Because the Ohio Supreme Court plainly views the search of an automobile's trunk and its passenger compartment under separate standards under Section 14, Article I of the Ohio Constitution, any judicial analysis must also address them separately.

{¶ 38} Under *Gant's* first justification (and consistent with *Farris*), the scope of an "incident to arrest" search would normally extend only to "the passenger compartment of an arrestee's vehicle and any containers therein," but *not* the trunk. *Gant*, 556 U.S. at 344. Yet, under *Gant's* second, reasonable-belief justification, once the officer has undertaken a valid evidentiary search of the passenger compartment relating to the crime of arrest, *Farris* can be fairly read as acknowledging that "other contraband [found] within the passenger compartment" could provide probable cause to move to the trunk. *Id*. at ¶ 51.

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[6] In contrast, the federal courts have held that an officer's detection of the smell of marijuana in the passenger compartment can by itself establish probable cause to search the entire vehicle. *See United States v. Bailey,* 407 Fed.Appx. 27, 29-30 (6th Cir.2011)*; compare United States v. Burnett,* 791 F.2d 64, 67 (6th Cir.1986) (finding a small bag of marijuana on the floor of the car gave the officer "every right to search the passenger area of the car, the trunk, and any and all containers which might conceal contraband"); *United States v. Mans,* 999 F.2d 966, 968 (6th Cir.1993) (a marijuana cigarette and a sum of cash provided probable cause to search the trunk of a car).

{¶ 39} Here, from Price's display of the cellophane wrapper at the vehicle, coupled with his inculpatory statement implying recent drug usage relating to that wrapper, and the smell of burnt marijuana that began with Sgt. Gerhardt's contact with Ervin, the officer could reasonably believe that further evidence of the crime *for which he arrested Price* would be in the passenger compartment—but *not* in the trunk at that point. However, when Gerhardt discovered the small bag of marijuana in the front seat, and the apparently related bag in the back seat, that additional indicia furnished sufficient probable cause to believe more contraband would be found in the trunk. And it is those predicate facts which narrowly distinguish the search of the trunk here from the search in *Farris. See also State v. Perry*, 11th Dist., No.2011-L-125, 2012-Ohio-4888, ¶ 21-23 (officer "did not search the trunk until more evidence was discovered in the interior cabin").

{¶ 40} Had Gerhardt not discovered those bags, a subsequent warrantless search of the trunk would have been unreasonable under *Farris*' stricter standard, unless another exception to the warrant requirement might be shown to apply, such as a valid inventory search following lawful impoundment.

{¶ 41} Accordingly, and for the foregoing reasons, I concur in the judgment reversing the trial court's order of suppression.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.