

Searching Incident to Arrest

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Searching Incident to Arrest

Agenda

Jonathan Rudd

Searching Incident to Arrest – The Development of the Case law

Carl Milazzo

Searching Cell Phones Incident to Arrest – Current Issues

Jayme Holcomb

Post – Gant Cases – Trends

Audience Participation – Moderated Discussion

Arizona v. Gant
129 S.Ct. 1710 (2009)

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Gant Holding

- 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.

1. Was there a Search?
 A. Government Action
 B. Reasonable Expectation of Privacy

NO

No Fourth Amendment Issue

YES

2. Search Warrant?
 A. Valid Search Warrant
 1. Probable Cause
 2. Oath/Affirmation
 3. Particularity
 4. Neutral and detached magistrate
 B. Lawfully Executed

YES

Search Presumed Reasonable

NO

3. Valid Exception to the Search Warrant Requirement?

	<u>Emergency</u>	<u>Consent</u>	<u>Incident to Arrest</u>	<u>Motor Vehicle</u>	<u>Inventory</u>
Prerequisite	A. Emergency 1. Safety—RS 2. Evidence—PC 3. Escape—PC	A. Voluntary Consent B. Apparent Authority	A. Lawful Arrest	A. Vehicle B. PC of Evidence/Contraband	A. Lawful Possession B. Established Procedure
Scope	A. Limited by Emergency	A. Limited by Consent	A. The Subject's Person B. Area within Immediate Control C. Immediately Adjoining Areas	A. Limited by the PC	A. Limited by Procedure

RS = Reasonable Suspicion
 PC = Probable Cause (Reasonable Belief)

NO

Suppression

YES

Valid Search



The Supreme Court Reexamines Search Incident to Lawful Arrest

by RICHARD G. SCHOTT, J.D.

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The authority of law enforcement officers to conduct a warrantless search after making a lawful, custodial arrest has been recognized by the U.S. Supreme Court for 95 years.¹ The recognition of the need to conduct searches incident to arrest predates even the Court's acknowledgment of it. In its 1914 *Weeks v. United States* decision, the Supreme Court pointed out that the case before it was “not an assertion of the right on the part of the government *always*

recognized under English and American law, to search the person of the accused when legally arrested, to discover and seize the fruits or evidences of crime.”² In spite of this long history, the search incident to lawful arrest exception to the Fourth Amendment warrant requirement,³ and the scope of the search thereby authorized, often has been debated in court opinions and law enforcement circles. After having what was considered a bright-line rule for almost 30 years regarding

the ability to search the passenger compartment of a vehicle incident to the arrest of a driver, passenger, or recent occupant of that vehicle, the Supreme Court decided on April 21, 2009, that this search is not subject to such a bright-line rule after all.⁴ The recent opinion must change the way law enforcement officers view their authority to conduct warrantless searches of vehicles following the arrest of a vehicle's driver, passenger, or recent occupant. As reported in the media the day after the opinion

SIA Principles

- **Weeks v. U.S., 232 U.S. 383 (1914)**
 - Authority to conduct warrantless SIA recognized...
- **Chimel v. California, 395 U.S. 752 (1969)**
 - Lawful custodial arrest
 - Evidence, Weapons, Means of Escape
- **New York v. Belton, 453 U.S.454 (1981)**
 - Scope of SIA in Motor Vehicle
- **Arizona v. Gant, 129 S.Ct. 1710 (2009)**
 - Limited Belton

Gant Holding

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Searching Electronic Devices

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SIA of Cell Phones Online at www.aele.org/llos2009

● LEB Feb 2009

- <http://www.fbi.gov/publications/leb/2009/february2009/february2009leb.htm#page25>

● Police Chief May 2009

- http://policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=1789&issue_id=52009

SIA Principles

● **Robinson and Chimel**

- Lawful custodial arrest
- Evidence, Weapons, Means of Escape

● **Belton**

- Scope of SIA in Motor Vehicle
Passenger Area

● **Gant**

- Limited Belton

SIA Applied to Cell Phones

- **Ortiz** – (7th Cir. 1996) – “finite memory” of pagers
- **Pena** – (WDNY 1999) – cell phone during booking
- **Brookes** – (DVI 2005) – analogy to pagers
- **Zamora** – (NDGA 2006) – incoming calls
- **Finley** – (5th Cir. 2007) – cell phone records and text messages

SIA of Cell Phones

- See footnote 14 of LEB article for numerous cases following Finley
- 2009 cases follow the trend:
 - 4th Cir. - Murphy
 - 10th Cir. - Briggs
 - SDGA - McCray

**Cracks are forming in NDCA, Neb, MDFL,
and SDFL**

Opposing Cases

Park (NDCA 2007)

- Distinguished cell phones from pagers, greater quantity of information reduces potential destructibility
- Also, inventory of data not justified

Florida Cases

● **Wall – (SD 2008)**

- Analogized to sealed letter instead of pager
- Text message presents no danger
- Data inventory not justified

● **Quintana – (MD 2009)**

- Squares with Gant, although decided earlier
- Not necessary for officer safety
- Not related to arrested offense (suspended DL)

Impact of Gant

- Searching for evidence related to crime or for safety
- Gant rule applied pre-Gant in *Quintana* and *Wall*, post-Gant in *McGhee* (2009 WL 2424104 (D. Neb.))
- **What about Cell Phones:**
 - On Arrested Person?
 - In Vehicle but Not on Person?
 - Left in Vehicle with Unarrested Passengers?
 - Others?

Searching Cell Phones SIA

Known

- Finite Memory
- Destructibility of Evidence
- Many lower courts follow Finley, some do not
- 4th, 5th, 10th support
- NDCA, MDFL, SDFL do not

Unknown

- Impact of Gant
- Whether the split will widen, close, or be resolved quickly by USSC

GPS Devices

- **LE Intentionally Placed Device – Generally No 4th Amendment REP**
 - Bank Robbery Bait Pack
 - Tracking Device
- **Spontaneously Searching User Device**
 - Comm v. LaCroix - 25 Mass. L. Rep 161 (2009)
Trackback on Dash Mounted GPS
 - US v. Coleman – 2008 US Dist Lexis 12276 (ED Mich 2008)
Order to Monitor OnStar Based on PC

Conclusion

1. Articulate:

- Proximity
- Elapsed Time
- Destructibility of Evidence

2. To Be Even Safer:

- Search Only for Evidence Related to Crime
- Get a Warrant

Searching Incident to Arrest

Cases citing Gant

- **Justice Alito Dissents**
- **Cases Finding Invalid Search Incident to Arrest Occurred**
- **Suspects Standing Near Vehicles**
- **Reason to Believe**
- **Plain View or Exception to the Search Warrant Requirement Applied**
- **Good Faith Exception**

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