LEGAL EAGLE

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Firearm in Vehicle

Jonathan Valley was stopped by police officers for a moving traffic infraction. When the officers approached the car, they observed a handgun in the car's glove box and smelled the odor of burnt marijuana. They asked Valley to step out of the car. Valley was wearing a crossbody pack over his shoulder and chest that was zipped closed. When the officers removed the pack and searched it, they discovered a loaded handgun. They arrested Valley for carrying a concealed firearm.

Valley filed a motion to dismiss arguing that under section 790.25(5), he was permitted to possess the concealed firearm because it had been securely encased within a private conveyance. The trial court agreed and dismissed the charge against Valley. On appeal, that ruling was reversed.

Issue:

Did the "private conveyance" exception to Chapter 790 exempt the firearm on the defendant's person while seated in the vehicle? **No**.

Firearm in a Private Conveyance:

Section 790.01(2) F.S., makes it a crime to carry a concealed firearm on or about the person. However, section 790.25(5) provides an exception to section 790.01(2). The exception is very specifically and clearly limited to private conveyances and states, in pertinent part:

(5) POSSESSION IN PRIVATE CONVEYANCE - Notwithstanding subsection (2), it is lawful and is not a violation of s. 790.01 to possess a concealed firearm or other weapon for self-defense or other lawful purpose within the interior of a private conveyance, without a license, *if the firearm is securely encased or is otherwise not readily accessible for immediate use*. Nothing herein contained prohibits the carrying of a legal firearm other than a handgun anywhere in a private conveyance when such firearm is being carried for lawful use. ***Nothing herein contained shall be construed to authorize the carrying of a concealed firearm or other weapon on the person***. This subsection shall be liberally construed in favor of the lawful use, ownership, and possession of firearms and other weapons, including lawful self-defense as provided in s. 776.012.

"Securely encased" means encased in a glove compartment, whether or not locked; in a snapped holster; in a gun case, whether or not locked; in a zippered gun case; or in a closed box or container which requires a lid or cover to be opened for access. F.S. 790.001(16).

"A gun case can be of any

type of receptacle for carrying a gun that makes the gun not readily accessible for immediate use. As long as the purposes of the statute are fulfilled, any further definitions are unnecessary." *Alexander v. State*, (Fla. 1985).

In another case, Daniel Doughty was riding a motorcycle when he threatened an off-duty officer in an unmarked vehicle. "I have a gun, I'll kill you." He then lifted his shirt, reached into a zippered pouch, and retrieved a firearm. He was arrested for aggravated assault and carrying a concealed firearm. He argued on appeal, that the firearm was securely encased and that he was operating a private conveyance.

However, in *Doughty v. State*, (4DCA 2008), the D.C.A. ruled, "We acknowledge that pursuant to the Supreme Court's holding in *Alexander v. State*, the handgun was 'securely encased' in Doughty's zippered pack. Yet, pursuant to the unambiguous language of section 790.25(5), even **a securely encased weapon does not fall under the private conveyance exception if it is carried 'on the person**.' … We recognize that 'section 790.25 specifically provides that the securely encased exception does not legalize the carrying of a concealed weapon on the person.'"

"We further note that the private conveyance exception of section 790.25(5), by its express terms, applies only to the carrying of a concealed weapon 'within the interior of a private conveyance.' We interpret this language to require a person carrying a concealed weapon without a permit, while riding a motorcycle, to keep the concealed weapon *securely encased and in an interior compartment* of the motorcycle."

Court's Ruling:

"On appeal, the State argues that the trial court's dismissal was error because it overlooked the sentence in section 790.25(5) that states that nothing in subsection (5) 'shall be construed to authorize the carrying of a concealed firearm ... *on the person*.' We agree that the trial court erred."

"The trial court adopted Valley's argument that as long as the firearm was securely encased, he could lawfully *possess* it anywhere in the vehicle—even on his person—because the statute does not limit the exception to constructive possession. This interpretation is inconsistent with the plain language of section 790.25(5), *which expressly limits the right to possess a firearm in a vehicle to those that are either securely encased or not otherwise available for immediate use and* ***not carried on the person***.

"Further, it ignores the directive in subsection (5) that it should not be construed in the manner suggested by Valley—that is to allow possession on the person. *See Doughty v. State*, (4DCA 2008) ('Pursuant to the unambiguous language of section 790.25(5), even a securely encased weapon does not fall under the private conveyance exception if it is carried 'on the person.' '); *Gemmill v. State*, (4DCA 1995) ('Section 790.25 specifically provides that the securely encased exception does not legalize the carrying of a concealed weapon on the person.'). Accordingly, we reverse the order dismissing the information and remand for further proceedings."

Lessons Learned:

A related issue can be found in *State v. Smith*, (4DCA 2011). Michael Smith was stopped for a moving traffic violation. Once he was outside of his vehicle, he advised the officer that there was an unsecured firearm under the passenger seat. Smith was charged by Information with carrying a concealed firearm pursuant to section 790.01(2), F.S.

The defendant filed a pretrial motion arguing that because the firearm was not "readily accessible" to him when the firearm was retrieved by the Deputy while he was outside of his vehicle the charges should be dismissed. The trial court granted Smith's motion. On appeal, that ruling was reversed..

The 4th D.C.A. found the critical issue was whether the facts as presented in court sufficiently established that the firearm was simultaneously "on or about the person" and "concealed from ordinary view" when the defendant was encountered by the Deputy. The fact that the defendant was later removed from the vehicle prior to the moment the firearm was seized was of no import.

> Section 790.25 specifically provides that **the securely encased exception does not legalize the carrying of a concealed weapon on the person**.

The D.C.A. cited to multiple cases where the defendant was outside of his vehicle for an extended time prior to the discovery of the firearm in the vehicle. Citing to *Evans v. State*, (1DCA 2009), the D.C.A. ruled, "the [defendant] was

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Hate Crimes 2022

Hate Crimes Reported by Year 2012-2022

Year	Total Reported Hate Crimes	Change from Previous Year
2012	170	+22.3%
2013	124	-27.1%
2014	73	-41.1%
2015	102	+39.7%
2016	124	+21.6%
2017	169	+36.3%
2018	168	-0.6%
2019	134	-20.9%
2020	127	-5.2%
2021	148	+16.5%
2022	229	+54.7%

Offense Totals by Motivation Type: January – December 2022

Offenses	Anti-Advanced Age-Florida	Anti-Homeless Status-Florida	Ethnicity/ National Origin	Race/Color	Religion	Sexual Orientation	Totals
Aggravated Assault	-	-	10	23	2	8	43
All Other Larceny		1	1	1	1	1	5
Burglary/Breaking & Entering	-	-	-	3	1	-	4
Destruction/Damage/ Vandalism of Property	-	-	7	17	27	4	55
False Pretenses/Swindle/ Confidence Game	1	-	-	1	1	-	3
Identity Theft	-	-	-	-	1	-	1
Intimidation	-	-	1	5	11	3	20
Purse-snatching	-	-	-	1	-	-	1
Robbery	-	-	-	1	-	4	5
Shoplifting	-	-	1	-	-	-	1
Simple Assault	-	-	12	33	8	35	88
Stalking	-	-	-	-	1	1	2
Wire Fraud	-	-	-	-	1	-	1
Totals	1	1	32	85	54	56	229

Source: ***Hate Crimes in Florida, Florida Attorney General, Ashley Moody 2022-hate-crimes-report-1228.final_.pdf***

Recent Case Law

Driving with a Revoked License

A Kansas deputy sheriff ran a license plate check on a pickup truck, discovering that the truck belonged to Charles Glover and that Glover's driver's license had been revoked. The deputy pulled the truck over because *he assumed the registered owner of the truck was also the driver.* Deputy did not observe any traffic infractions, and further did not attempt to identify the driver of the truck. Based solely on the information that the registered owner of the truck was revoked Deputy initiated a traffic stop.

Glover was in fact driving and was charged with driving as a habitual violator. He moved to suppress all evidence from the stop, claiming that the Deputy lacked reasonable suspicion. The trial court granted the motion. However, the Kansas Court of Appeals reversed, holding that "it was reasonable for [Deputy] Mehrer to infer that the driver was the owner of the vehicle" because "there were specific and articulable facts from which the officer's common-sense inference gave rise to a reasonable suspicion." However, the Kansas Supreme Court then reversed and ruled that the Deputy violated the Fourth Amendment by stopping Glover without reasonable suspicion of criminal activity. On appeal, the U.S. Supreme Court agreed with the Court of Appeals and reversed the Kansas Supreme Court ruling.

Issue:

Does a police officer violate the Fourth Amendment by initiating an investigative traffic stop after running a vehicle's license plate and learning that the registered owner has a revoked driver's license? **No.**

Legal Traffic Stop:

Under the U.S. Supreme Court's precedents, the Fourth Amendment permits an officer to initiate a brief investigative traffic stop when he has "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States v. Cortez*, (1981); see also *Terry v. Ohio*, (1968). "Although a mere 'hunch' does not create reasonable suspicion, the level of suspicion the standard requires is considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause."

Because it is a "less demanding" standard, "reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause." *Alabama v. White*, (1990). The standard "depends on the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Ornelas v. United States*, (1996). Courts "cannot reasonably demand scientific certainty ... where none exists." Rather, they must permit officers to make "commonsense judgments and inferences about human behavior." See, *Prado Navarette v. California*, (2014), noting that an officer "need not rule out the possibility of innocent conduct."

Court's Ruling:

"We have previously recognized that States have a 'vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles [and] that licensing, registration, and vehicle inspection requirements are being observed.' *Delaware v. Prouse*, (1979). With this in mind, we turn to whether the facts known to Deputy Mehrer at the time of the stop gave rise to reasonable suspicion. We conclude that they did."

"Before initiating the stop, Deputy Mehrer observed an individual operating a 1995 Chevrolet 1500 pickup truck with Kansas plate 295ATJ. He also knew that the registered owner of the truck had a revoked license and that the model of the truck matched the observed vehicle. From these three facts, Deputy Mehrer drew the commonsense inference that Glover *was likely the driver* of the vehicle, which provided more than reasonable suspicion to initiate the stop."

"*The fact that the registered owner of a vehicle is not always the driver of the vehicle does not negate the reasonableness of Deputy Mehrer's inference*. Such is the case with all reasonable inferences. The reasonable suspicion inquiry 'falls considerably short' of 51% accuracy, see *United States v. Arvizu*, (2002), for as we have explained, '*to be reasonable is not to be perfect*,' *Heien v. North Carolina* (2014)."

"Glover's revoked license does not render Deputy Mehrer's inference unreasonable either. Empirical studies demonstrate what common experience readily reveals: Drivers with revoked licenses frequently continue to drive and therefore to pose safety risks to other motorists and pedestrians."

The Supreme Court went on to note that Kansas law reserved revoking driver's license only for the worst of the worst, such as convictions for involuntary manslaughter, vehicular homicide, battery, reckless driving, fleeing or attempting to elude a police officer, or conviction of a felony in which a motor vehicle is used, and where a driver "has been convicted with such frequency of serious offenses against traffic regulations governing the movement of vehicles as to *indicate a disrespect for traffic laws and a disregard for the safety of other persons on the highways*," or the motorist "has been convicted of three or more moving traffic violations committed on separate occasions within a 12-month period." Which led the Supreme Court to conclude, "The concerns motivating the State's various grounds for revocation lend further credence to the inference that a registered owner with a revoked Kansas driver's license might be the one driving the vehicle."

"Glover and the dissent argue that Deputy Mehrer's inference was unreasonable because it was not grounded in his law enforcement training or experience. Nothing in our Fourth Amendment precedent supports the notion that, in determining whether reasonable suspicion exists, an officer can draw inferences based on knowledge gained *only* through law enforcement training and experience. We have repeatedly recognized the opposite. … The inference that the driver of a car is its registered owner does not require any specialized training; rather, it is a reasonable inference made by ordinary people on a daily basis."

"In reaching this conclusion, we in no way minimize the significant role that specialized training and experience routinely play in law enforcement investigations. We simply hold that such experience is not *required* in every instance."

Importantly, the Supreme Court also made clear that where there is conflicting information the reasonableness of the assumption that the registered owner is the driver is no longer reasonable. "We emphasize the narrow scope of our holding. Like all seizures, 'the officer's action must be 'justified at its inception.' 'The standard takes into account the totality of the circumstances—the whole picture.' As a result, **the presence of additional facts might dispel reasonable suspicion**. For example, if an officer knows that the registered owner of the vehicle is in his mid-sixties but observes that the driver is in her mid-twenties, then the totality of the circumstances would not 'raise a suspicion that the particular individual being stopped is engaged in wrongdoing.' 'Each case is to be decided on its own facts and circumstances' Here, *Deputy Mehrer possessed no exculpatory information—let alone sufficient information to rebut the reasonable inference that Glover was driving his own truck—and thus the stop was justifie*d. For the foregoing reasons, we reverse the judgment of the Kansas Supreme Court."

Lessons Learned:

At the outset it is important to keep in mind the Court's stated limitation on their current ruling, "… **the presence of additional facts might dispel reasonable suspicion**." Thus, the race and sex of the driver as observed at the time of the stop, as compared to DMV record can negate the reasonableness of the stop. Once the officer is aware of the discrepancy, he/she must break off the citizen contact. The Florida Supreme Court placed a similar restriction on police actions when the initial basis for the stop was neutralized. "While the officer's reason for the initial stop may arguably have been legitimate, [investigating a temporary tag] once that bare justification had been totally removed, [on closer inspection the tag was valid] the officer's actions in further detaining Mr. Diaz equated to nothing less than an indiscriminate, baseless detention..."

"Thus, even if we assume that the officer made a proper initial stop of the vehicle, he should have ceased asking for additional information [including the requirement to provide license and registration] when he found that the plate was, in fact, properly placed." *State v. Diaz,* (Fla.2003).

On a more basic level, the United States Supreme Court has found traffic stops a/k/a/ safety stops, merely to determine if a motorist is licensed as the sole basis for the stop unlawful. "It is a violation of the Fourth Amendment to stop an automobile and detain a driver to check his license and registration unless there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered." *Delaware v. Prouse*,

(S.Ct.1979).

With that said, from a purely legalistic position this Supreme Court ruling does not break new ground. In *State v. Laina*, (5DCA 2015), Officer Bruns ran a check on a license plate, which revealed that the registered owner of the vehicle had a suspended license. Based on that information, and that information alone, Officer Bruns conducted a traffic stop. The defendant driver moved to suppress the stop and all evidence arising therefrom. The D.C.A. ruled, however, "The relevant probability here is that most vehicles are driven by their owners, most of the time. As such, once Officer Bruns discovered that the owner of the vehicle he was following had a suspended driver's license, this 'articulated fact' gave him a 'founded suspicion' that the driver might be driving illegally. As explained in *Smith v. State*, (5DCA 1991), it is this articulated basis—grounded in reasonable probabilities—that distinguishes the legal stop in this case from an illegal stop in which 'the officer's conduct is ... dictated by personal whim or capriciousness.' "

And other prior cases have held that an officer is permitted to rely on data from state agencies to lawfully stop a vehicle to investigate a possible infraction or violation. Where an officer actually had information indicating that the Department of Motor Vehicles had no record of a tag, which in light of the Officer's experience gave her a reason to suspect that the car was not properly registered, Officer was justified in stopping Ellis to investigate. "Ellis argues that Officer Wilson did not have a reasonable suspicion because she admitted that there had been occasions when she had received the 'no record found' response and then on further investigation determined the car was properly registered. 'Even in *Terry* the conduct justifying the stop was ambiguous and susceptible of an innocent explanation.' …*Where the facts known to an officer suggest, but do not 'necessarily' indicate ongoing criminal activity, an officer is entitled to detain an individual to resolve the ambiguity*."

"*Terry* does not require absolute certainty nor does it require an officer to ignore the facts that indicate an individual may be committing a crime simply because those facts do not rise to the level of probable cause to make an arrest." *Ellis v. State*, (2DCA 2006).

And in a case evaluating the legality of a traffic stop based solely on a DMV computer "hit" that the insurance status of the motorist was "unconfirmed," the court found the stop to investigate that data was lawful. "We agree that a state computer database indication of insurance status may establish reasonable suspicion when the officer is familiar with the database and the system itself is reliable. If that is the case, a seemingly inconclusive report such as 'unconfirmed' will be a specific and articulable fact that supports a traffic stop." *United States v. Broca-Martinez*, (5th Cir. 2017).

What ties all these cases together, along with the Supreme Court ruling, is this simple statement of the law, "This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.' " *U.S. v. Arvizu*, (S.Ct.2002).

Kansas v. Glover
U.S. Supreme Court
(April 6, 2020)

Vehicle Crash

At 1:16 a.m., Officer Mixon responded to a report of a traffic crash. He found Damien McCartha standing near his pickup truck, which was mostly overturned in a ditch. The truck was not operable. Defendant was not observed in the truck, and no one else was present at the scene. The truck had not hit another vehicle, person, or structure other than the road and the ditch. There was damage to the roadway and the truck including a broken headlight.

Officer started an investigation because he believed Defendant was driving under the influence. He smelled strongly of alcohol. Defendant performed field sobriety exercises poorly. The truck was towed out of the ditch. A cup with alcohol and an empty miniature liquor bottle were discovered.

Defendant was arrested for DUI and transported to the County Jail. There, after an observation period, he registered a .191 blood alcohol content on the breath test. Defendant was charged with DUI.

Defendant moved to suppress his arrest and all evidence obtained during and afterward. He claimed that his arrest for misdemeanor DUI was invalid since no crime occurred in the presence of the arresting officers. He further argued that his truck being in a ditch was not a "crash" to support his warrantless arrest. The trial judge agreed, finding no crash had occurred, and

suppressed all the evidence. On appeal, that ruling was reversed.

Issue:

Was Defendant's vehicle "involved in the crash" allowing for a warrantless misdemeanor arrest for driving under the influence of alcohol, when his vehicle was found overturned in a ditch with a damaged headlight, but with no evidence that the vehicle had hit anything besides the road and the ditch? **Yes**.

Warrantless Arrest:

A warrantless arrest for a misdemeanor is generally only allowed when a crime is committed in the presence of law enforcement, sec. 901.15(1), F.S. One exception to this general rule is that following "an investigation at the scene of a **traffic crash**" an officer "may arrest any driver of a vehicle involved in the crash when based on personal investigation, the officer has reasonable and probable grounds to believe that the person has committed" certain offenses including crimes under Chapter 316. See, § 316.645. In that DUI is a crime under section 316.193, if Defendant's vehicle was "involved in the crash," his arrest was lawful.

An officer can arrest a person for misdemeanor DUI in three circumstances: 1. "the officer witnesses each element of a prima facie case," 2. the "officer is investigating an 'accident' [and] develops probable cause to charge DUI," or 3. "one officer calls upon another for assistance [and] the combined observations of the two or more officers are united to establish the probable cause to the arrest." *Steiner v. State*, (4DCA 1997).

Court's Ruling:

"In, *State, Department of Highway Safety and Motor Vehicles v. Williams*, (1DCA 2006), we rejected Williams' argument and stated, 'crash,' is variously defined as 'a breaking to pieces by or as if by collision' or 'an instance of crashing,' (*Webster's Collegiate Dictionary),* and 'collide,' which in turn means 'to come together with solid or direct impact.' We held that a crash occurs when a driver/ defendant's vehicle is damaged by colliding with "another object resulting in damage" to the vehicle."

"Although Williams suffered only minimal damage to her vehicle when it came to rest in a drainage ditch, that was sufficient to meet the definition of a 'crash.' As we stated in *Williams*, 'Although the term 'traffic crash' reasonably contemplates some degree of damage, it clearly does not imply that damage must have occurred to the property of another, nor does it set a minimum amount necessary in order for such an incident to legally occur.' "

"When interpreting a statute, we are to give the language used by the legislature its 'plain and ordinary meaning.' In *Williams* we sought to define the term 'traffic crash' used in section 316.645. There, the driver's vehicle ran a stop sign and came 'to rest in a nearby drainage ditch.' The incident caused approximately '$100 in damages to the vehicle.' Williams argued that since 'no damage occurred to property other than that belonging to Williams' no crash had occurred. We rejected that argument."

"Here, [Defendant] claims that there was insufficient evidence of damage to the truck, but the undisputed testimony was that the truck's headlight was damaged. As a result, [Defendant's] truck was involved in a crash under the plain meaning of the term as stated in *Williams*."

"In, *Gaulden v. State*, (Fla. 2016), the Court considered the meaning of the phrase 'involved in a crash' when the victim had jumped or been thrown from a moving vehicle and the vehicle did not hit the victim. The Court defined the phrase to mean 'that a vehicle must collide with another vehicle, person, or object.' The road and the ditch are objects. Contrary to [Defendant's] argument, what occurred was more than just normal contact between the truck and the road or the ditch. When [Defendant's] truck overturned, it collided with the ditch and was damaged. *Driving through or into a ditch with no damage or impact on the operation of the vehicle may not be a crash*. But a vehicle coming to rest upside down in a ditch must have had solid or direct impact with the ditch, meeting the definition of collide, which in turn meets the definition of crash."

"Since a crash occurred when [Defendant's] truck impacted the ditch and was damaged, the arrest of [Defendant] was lawful under section 316.645. The order granting [Defendant's] motion to suppress is REVERSED."

Lessons Learned:

The D.C.A. also noted, "Justice Canady's concurrence in *Gaulden* is instructive. He stated that 'vehicle involved in a crash' is commonly understood to refer to circumstances in which the vehicle has been in collision with something or someone.' He explained that the term 'involved in a crash' includes a vehicle that 'has flipped over and crashed into the ground' like [Defendant's] truck

here." "The only difference here from the hit and run statute in *Gaulden* is section 316.645 discusses 'the' crash rather than 'a' crash. The distinction is immaterial."

Because the arresting officer was the DUI expert and not the initial officer on the scene, his arrest is only sustained under the fellow officer rule. The D.C.A. pointed out in footnote 1., "The fellow officer rule can be used when determining whether a misdemeanor was committed 'in the presence of the officer.' See, *State v. Lord*, (1DCA 2014); *State v. Boatman*, (2DCA 2005). But 'all elements of the offense must occur in the police officer's presence or have been personally observed by a fellow law enforcement officer.' *Lu Jing v. State*, (4DCA 2021). So, unless the crash exception applied here, since the officers did not observe [Defendant] 'driving or in actual physical control of a vehicle,' they could not make a lawful misdemeanor arrest for DUI. § 316.193(1)."

State v. McCartha
1st D.C.A.
(Sept. 6, 2023)

Search Incident to Arrest

Sheriff's deputies obtained a warrant for Jamari Jean's arrest for one count of aggravated battery with a firearm and one count of aggravated assault with a firearm. To execute the warrant, the deputies surveilled Jean's home and waited for him to return to complete the arrest. Jean arrived on a bicycle; he was wearing two bags, a backpack, and a fanny pack that was strapped to the front of his chest. When Jean saw the deputies, he walked into the garage. Jean had to be subdued. Once on the floor, he was placed in handcuffs. The deputies then removed both bags from him. The fanny pack was removed and placed on the hood of a car that was in the driveway. During this time Jean was eight to ten feet away from the fanny pack, handcuffed with his hands behind his back, surrounded by deputies. The deputy had exclusive control over the fanny pack at all times after it was removed from Jean.

The fanny pack had a keylock on it. Deputy asked the officers to search Jean for the key. Once the key was found on Jean, Deputy unlocked the fanny pack and found the firearm which Jean was ultimately convicted of possessing. The only warrant the deputies obtained was the arrest warrant that they were executing. The deputies never sought or obtained a warrant to search Jean's locked fanny pack.

Defendant argued that the search was not justified under the search-incident-to-arrest warrant exception. The trial court denied the motion to suppress. On appeal, that ruling was reversed.

Issue:

Was the search of the fanny pack, after the defendant's arrest, lawful as a search incident to arrest? **No**.

Search Incident to Arrest:

The United States Supreme Court in *Chimel v. California*, (S.Ct.1969), held that, although police may conduct a warrantless search incident to a lawful arrest to locate weapons or evidence of the crime, the search must be limited to the arrestee's person and the area within the arrestee's "immediate control." This decision led to much debate about how to determine the area of control. It was generally referred to as that area within the arrestee's "wingspan." Subsequently, the Court decided *Arizona v. Gant*, (2009). Gant had been arrested for a traffic violation, handcuffed, and secured in a police car before the search incident to arrest took place. Thus, the search could not be premised on the rationale that Gant might gain access to a weapon or destroy evidence. The Court held that the search was unlawful, stating:

"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."

This limitation "ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy."

Applying this limitation, the United States Supreme Court has stated that once "there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply." See, *Gant*. Thus, where an arrestee has been secured by police officers and separated from the thing that the officers wish to search, the rationales for the search incident to arrest exception do not apply, and

accordingly, a search of that thing cannot be conducted without a warrant.

The Third District Court of Appeal has specifically held that, in the case of a backpack carried by an arrestee at the time of arrest, once police officers have reduced the backpack to their exclusive control and there is no longer any danger of the arrestee gaining access to the backpack, the search of the backpack can no longer be justified as a search incident to arrest. *Harris v. State*, (3DCA 2018).

See also, *U.S. v. Knapp*, (10th Cir. 2019) (holding that in the case of a purse carried by an arrestee at the time of arrest, police officers could not search the purse as a search incident to arrest where the arrestee had been secured and police officers had reduced the purse to their exclusive control by the time of the search).

Court's Ruling:

"In the proceedings below, the trial court correctly concluded that 'once the backpack and the fanny pack were removed from the Defendant and placed upon the hood of the police car, out of reach of the Defendant, a search based upon officer safety or destruction of evidence would no longer have been justified.' This conclusion was mandated by the Supreme Court's holding in *Gant* that 'if there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply.' See also*, Smallwood v. State*, (Fla. 2013) ('*Gant* demonstrates that while the search-incident-to-arrest warrant exception is still clearly valid, *once an arrestee is physically separated from an item or thing, and thereby separated from any possible weapon or destructible evidence, the dual rationales for this search exception no longer apply.*').

The trial court found, however, that the search of the fanny pack was justified because the officers had a reasonable basis to believe that the search of the fanny pack would reveal evidence relevant to the crime for which Jean was arrested. This was error."

"As explained above, the 'evidence relevant to the crime of arrest' exception or 'vehicle of the arrestee exception,' as the Third District Court of Appeal called it, applies only to vehicles and any containers therein. Assuming Jean's bicycle qualified as a vehicle (which we do not decide), Jean's fanny pack was not at any point stored on or in the bicycle. Instead, the fanny pack was worn by Jean on his person after he dismounted his bicycle. Because the fanny pack was never stored on or in a vehicle, the officers were not permitted to search the fanny pack pursuant to the 'evidence relevant to the crime of arrest' exception established in *Gant*."

"The police officers' search of Jean's fanny pack violated the Fourth Amendment to the United States Constitution as interpreted by the United States Supreme Court. The State did not establish that any exception to the exclusionary rule applied to permit the admission into evidence of the firearm and ammunition that was obtained as a result of that search. For these reasons, the trial court erred by denying Jean's motion to suppress that evidence. REVERSED."

Lessons Learned:

An interesting alternative scenario was presented in, *United States v. Cook*, (9th Cir. 2015). Agents conducted a controlled drug buy. Cook returned to the house carrying the same backpack and was promptly arrested at gun point, placed on the ground, and handcuffed. While Cook was still on the ground and within one or two minutes of his arrest, Officer Knight picked up the backpack, *which was right next to Cook*, and conducted a twenty or thirty-second cursory search for weapons or contraband. Finding no weapons, the agents quickly moved Cook and the backpack to a more secure area where the agents did a more thorough search of the backpack. During this second search, they found drugs and evidence all connected to the drug sale.

Defendant filed a motion to suppress all the contraband seized arguing that the search was not a lawful search incident to arrest in that he was secured with handcuffs at the time and was therefore unable to harm the officers or destroy the evidence. The Court of Appeals disagreed.

"We agree that Cook's position at the time of the search—face down on the ground with his hands cuffed behind his back—is a highly relevant fact in determining whether the search was justified. Yet Cook's argument ignores other countervailing facts that we must also consider. The search, both quick and cursory, was 'spatially and temporally incident to the arrest.' It occurred immediately after Officer Knight arrived on the scene, as Cook was being taken into custody. ***Cook's backpack was right next to him***. And, within

twenty to thirty seconds, as soon as Officer Knight determined that the backpack contained no weapons, he immediately stopped the search. *The brief and limited nature of the search, its immediacy to the time of arrest, and the location of the backpack ensured that the search was 'commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that [Cook] might conceal or destroy.*' See, *Gant*."

Jean v. State
6th D.C.A.
(Aug. 31, 2023)

(Continued from page 2)

Firearm in Vehicle

inside the vehicle with the concealed firearm at the time the law enforcement officer approached; the [defendant] was ordered out of the vehicle; and the firearm was found concealed in the vehicle immediately after."

"The firearm was readily accessible immediately prior to the defendant being ordered out of the car. Smith would have us hold that based on [other cases], anytime a firearm is retrieved from a vehicle after the person charged is out of the vehicle, the requirement that the firearm be 'on or about the person' or 'readily accessible' cannot be met. We decline to so hold."

"The facts in [other cases] are distinguishable from the instant case. In those cases, the defendant was out of the vehicle when approached by law enforcement. Here, Smith concealed the firearm underneath the passenger seat as the Deputy approached the vehicle. We cannot say as a matter of law that the firearm was not 'on or about his person' or not 'readily accessible' to him. Smith had been outside his vehicle for a mere seven minutes before the firearm was retrieved. …We therefore reverse the dismissal…"

Thus, the firearm was **simultaneously** "on or about the person" and "concealed from ordinary view" *when the individual was encountered by the Deputy.* The fact that the defendant was later removed from the vehicle prior to the moment the firearm was seized was of no import.

State v. Valley
2nd D.C.A.
(Jan. 19, 2024)

Don't forget …

February 14th

February 19th