



# *DPS Legal Review*

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## **SEARCH INCIDENT TO ARREST**

This month the United States Supreme Court rendered a decision regarding search and seizure incident to an arrest. In that case, Tucson Police responded to an anonymous tip of ongoing drug activity at a house. They knocked on the front door and asked to speak to the owner. Rodney Gant ("Gant") answered the door and told the officers that the owner was not at home. He did not permit them to enter the home. After leaving, the officers determined that Gant had a suspended license and that there was an outstanding warrant for his arrest for driving on a suspended license. The officers returned to the house later that evening.

When Gant returned to the home driving a car, he was immediately arrested and placed in a patrol vehicle. After Gant's arrest for the traffic offense, two officers searched his vehicle (finding a gun in the car and cocaine in the pocket of a jacket on the back seat). Gant was later charged with possession of a controlled substance with the intent to sell and possession of drug paraphernalia.

Gant sought to suppress the evidence at trial: 1) because he was already handcuffed and presented no threat to the officers and 2) because evidence of the traffic offense could not reasonably be found *via* a search of the vehicle. When asked during the suppression hearing why the search was conducted, an officer responded, "Because the law says we can do it."

**HOLDING:** The Court held that once an occupant of a vehicle is removed from the vehicle and handcuffed, the police may not search or enter the vehicle as a search incident to arrest. Rather, officers may only search a vehicle incident to arrest if:

1) the arrestee is within reaching distance of the passenger compartment at the time of the search, **or**

2) it is reasonable to believe that the vehicle contains evidence of the offense which is the subject of the arrest.

In this case, the offense was driving on a suspended license, so police would have to be looking for evidence of that offense. The Court held that it was not reasonable to believe that they might find such evidence. To reiterate, officers may search a vehicle of 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 the arrest. Thus, if the arrest is for driving while intoxicated, officers would be looking for evidence of that crime.

The Court's holding makes it clear that the law does not authorize a free search of a car simply because an occupant has been arrested. However, the exceptions to this general rule remain unchanged. For example, if the vehicle is to be towed, an administrative inventory search may be conducted. Likewise, any occupant of the vehicle may consent to the search of items over which they have control. Nonetheless, if in doubt, secure the vehicle and obtain a search warrant. Arizona v Gant, 556 U.S. \_\_ (2009).

## **NOTICE OF LICENSE SUSPENSION**

An officer from the Athens-Clarke County Police Department stopped the Defendant driver (who was in his girlfriend's car) because a headlight was out. The officer told the Defendant the reason for the stop and asked for his name, date of birth, and driver's license. The officer ran the information through central dispatch. Central dispatch told the officer that the Defendant's license had been suspended for failure to appear in court on a traffic offense and that notice had not been served. The officer immediately served

the Defendant with written notice of the suspension and placed him under arrest for driving with a suspended license.

Thereafter, the Defendant moved to suppress the evidence recovered from a search of the vehicle. The motion to suppress was denied. The Defendant was convicted of possession of cocaine with intent to distribute and a headlight violation. He was acquitted of driving with a suspended license.

On appeal, the Defendant argued that the search of his girlfriend's car was not conducted pursuant to a lawful arrest. Specifically, he argued that the officer lacked probable cause to arrest him since central dispatch told the officer that the Defendant had not been served with notice of the suspension of his license.

**HOLDING:** The Court held that the arrest was lawful. The Court found that the fact that GCIC did not reflect a service date for the license suspension did not prevent the Defendant's arrest for violation of O.C.G.A. §40-5-121. This was true despite the fact that he was not ultimately convicted of the offense.

The Court's holding was based, in part, upon the deletion of language from O.C.G.A. § 40-5-121 that required a charge of driving with a suspended license ("DWSL") to be based upon a verified service date. The Court recognized that changes to O.C.G.A. §40-5-56, effective January 1, 2010, will provide that notice of a failure to appear suspension will be through the language on the Uniform Traffic Citation for the underlying offense. Johnson v. State, \_\_S.E.2d\_\_, 2009 WL 839923 (Ga. App.).

### DUI/BOLO

A BOLO call was issued after a driver reported a car cutting off other cars and forcing them off the road. The driver described the car and gave its tag number to the 911 operator. A Whitfield County Sheriff's officer saw a vehicle that appeared to match the description of the vehicle sitting in a driveway of a residence. The Defendant answered the door of the residence. He told the officer that the car belonged to him and that he had been at home. He admitted being in the area where the driver observed the erratic driver earlier that day, but he claimed that he did not start drinking until after he arrived home. The Defendant was arrested for DUI and taken to the county jail. The Defendant's blood alcohol content was .145. He was convicted of

DUI. He appealed his conviction arguing that the evidence was circumstantial.

**HOLDING:** The Court held that the Officer observed circumstances from which the trier of fact could infer that the Defendant was in actual physical control of the car when the BOLO call was issued. DUI may be shown by circumstantial evidence.

### INQUIRING MINDS

**QUERY:** With what code section should an unlicensed driver who continues to offend be charged?

**ANSWER:** O.C.G.A. § 40-5-121 addresses how to handle the issue of unlicensed drivers who repeatedly offend. Note that repeated violations result in increased fines, fingerprinting requirement, and enhanced sentencing.

### ALS REMINDERS

⊗ A copy of the updated GBI approved list of Alco-Sensors has been added to the ALS Forms folder which is located on My DPS website. To locate, go to DPS Forms, click on ALS Forms, and look for the PBT list.

⊗ When entering into an ALS plea agreement, you may wish to limit the time within which the DUI plea must be entered. If so, write the time limit on the plea agreement form.

⊗ Never attempt to explain the implied consent notice to a defendant. Do not answer any questions regarding the implied consent notice. If the defendant asks questions regarding implied consent, either reread the implied consent notice or let the defendant read the implied consent notice.

⊗ Remember that the number of clues that are being checked on each of the Standardized Field Sobriety Tests are: 1) six clues on the horizontal gaze nystagmus, 2) eight clues on the walk and turn, and 3) four clues on the one leg stand.

### QUOTABLE WISDOM WORKS

"Freedom is nothing but a chance to be better.  
~Albert Camus

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