

Gant and Herring

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The Supreme Court (Washington, not Raleigh) has been exceptionally busy with criminal law matters over the last few months. As readers of this blog know, two of the blockbuster decisions this Term have been [Arizona v. Gant](#), which severely restricted vehicle searches incident to arrest, and [Herring v. United States](#), which held that the exclusionary rule should not apply to evidence obtained as the result of an arrest that was made by an officer with a good faith but mistaken belief that the defendant was the subject of an outstanding arrest warrant.

A number of folks -- including me, in [this blog post](#), and my colleague Bob Farb, in his [paper on Gant](#) -- have asked whether the *Herring* "good faith" exception to the exclusionary rule can be applied to "save" pre-*Gant* vehicle searches incident to arrest that were conducted in good faith reliance on what appeared to be settled law allowing such searches.

A federal district court has just addressed that issue. I think it's the first opinion on point, and the judge answered in the negative. In *United States v. Buford*, __ F.3d __, 2009 WL 1635780 (M.D. Tenn. June 11, 2009), the defendant was driving when an officer ran his tag, learned he was the subject of an outstanding arrest warrant, and stopped him. After arresting the defendant, the officer searched the passenger compartment of his vehicle and found a handgun. The defendant was charged federally with illegal possession of the gun.

After *Gant* came down, the defendant moved to suppress. The government conceded that the case was on all fours with *Gant*, and that *Gant* applied retroactively. However, it argued that even though the search violated the Fourth Amendment, the exclusionary rule should not apply, because the arresting officer was acting in good faith based on the law as it stood at the time of the search.

The court noted the "tension" between the fact that *Gant* applies retroactively and the good faith considerations raised by *Herring*. Ultimately, however, it ruled that applying the good faith exception in cases like the defendant's would lead to "perverse" results -- particularly, it noted, the defendant in *Gant* would himself not be entitled to suppression under the government's reasoning, because the officers in his case, too, acted in good faith based on what appeared to be settled law.

This decision won't be the last word on this issue. For one thing, the government may file an interlocutory appeal, and for another, other courts may analyze the issue differently. Stay tuned for further developments on this fascinating and consequential point.