

## Searching Cars for Evidence of DWI

**Author :** Shea Denning

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Is it reasonable to believe that the car an impaired driver is operating contains evidence of the DWI? That's the question law enforcement officers must answer in a post-*Gant* world before searching the vehicle recently operated by a defendant arrested for DWI and secured outside the vehicle.

### Review.

The United States Supreme Court held in *Arizona v. Gant*, 556 U.S. 332 (2009), that, when a defendant is arrested, the vehicle he recently occupied may be searched incident to his arrest only if one of two circumstances exists: (1) the defendant is unsecured and within reaching distance of the passenger compartment of the car at the time of the search; or (2) it is reasonable to believe the vehicle contains evidence of the offense of arrest. Before *Gant*, the Supreme Court's holding in *New York v. Belton*, 453 U.S. 454 (1981), was widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there was no possibility the arrestee could gain access to the vehicle at the time of the search and no basis to believe that evidence of the crime of arrest would be found in the vehicle.

The North Carolina Supreme Court in *State v. Mbacke*, 365 N.C. 403 (2012), equated *Gant*'s "reasonable to believe" standard with the reasonable suspicion required to conduct a brief investigatory stop pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968). Thus, when investigators have a reasonable and articulable basis to believe that evidence of the offense of arrest will be found in a suspect's vehicle after the occupants have been removed and secured, the investigators are permitted to search the vehicle. *Mbacke* explained that the reasonable to believe standard under *Gant* will not routinely be based on the nature or type of the offense of arrest. 365 N.C. at 411. Instead, the circumstances of each case ordinarily will determine the propriety of any vehicular searches conducted incident to arrest. *Id.*

### Vehicle Searches following DWI Arrests Deemed Lawful.

While no North Carolina appellate court has considered the lawfulness of a vehicle search incident to arrest for impaired driving, several courts in other jurisdictions have analyzed this issue. Most of these courts have upheld such searches as lawful under *Gant*. Consider the following cases:

- *United States v. Grote*, 408 F. App'x 90, 91 (9th Cir. 2011) (search of vehicle lawful after defendant's impaired driving arrest because "[i]t was reasonable to believe that the car might contain one or more bottles of open liquor or drugs")
- *United States v. Martinez*, 403 F. App'x 182, 183-84 (9th Cir. 2010) (search of vehicle for evidence of drug use following defendant's impaired driving arrest was lawful)
- *United States v. Tinsley*, 2010 WL 681328, \*2 (8th Cir. Mar.1, 2010) (warrantless search of vehicle incident to arrest proper under *Gant* where officers' observations of defendant's behavior coupled with strong odor of alcohol gave reasonable basis to believe that evidence relevant to Tinsley's intoxication (such as bottles containing alcohol) might be found in vehicle)
- *United States v. Stapleton*, 12-11-ART-(1), 2013 WL 3935104 (E.D. Ky. July 30, 2013) (search of vehicle following impaired driving arrest lawful where defendant told officers that he had taken a pill and had an alcoholic coffee creamer and the officers smelled alcohol coming from his car and saw a cup of dark liquid;

- officers could reasonably believe that the car might contain other pills or contain other containers of alcohol)
- *United States v. Hyde*, 3:10-CR-169-AKK-JEO, 2012 WL 4734583 (N.D. Ala. Sept. 27, 2012) (search of vehicle following impaired driving arrest lawful; evidence supporting reasonable belief that vehicle contained evidence of impaired driving offense included smell of alcohol on defendant's breath, defendant's failing of sobriety tests, and alleged smell of alcohol inside cup in car)
  - *United States v. Knight*, CR411-347, 2012 WL 1898952 (S.D. Ga. May 23, 2012) (vehicle search lawful where officers "developed probable cause to believe not only that Knight was driving under the influence but also that, given the strong odor of alcohol on his breath and his agitated and disoriented state, he had recently consumed alcohol"; thus, it was reasonable for the officers to conclude that evidence of that alcohol consumption would be found in the vehicle)
  - *United States v. Francis*, 11-40064-01-RDR, 2011 WL 5837182 (D. Kan. Nov. 21, 2011) (search of vehicle lawful where impaired driving defendant said she had taken Lortabs that might affect her performance on field sobriety tests and the officer smelled a strong odor of alcohol coming from the car)
  - *United States v. Harris*, 09-00385-01CRW-DGK, 2010 WL 2265454 (W.D. Mo. Apr. 22, 2010) report and recommendation adopted, 09-00385-01CRWDGK, 2010 WL 2265446 (W.D. Mo. June 2, 2010) (search of vehicle after impaired driving arrest was lawful where officer's observations gave him "a reasonable basis to believe that evidence relevant to Harris' intoxication (such as bottles containing alcohol or drug paraphernalia) might be found in the vehicle")

### **But Not Always.**

Not all courts have deemed lawful vehicle searches following impaired driving arrests. In *People v. Mason*, 935 N.E.2d 130, 135 (Ill. App. 2010), the Illinois appellate court held that officers' "random or ordinary" search of vehicle for contraband, weapons, and high-value items after impaired driving arrest was unlawful.

### **Factors to Consider.**

Given the *Mbacke* court's statement that the circumstances of the case rather than the nature of the offense ordinarily determine the reasonableness of the search, officers should identify what information related to a particular impaired driving offense gives rise to a belief that evidence of the crime is in the vehicle before searching under *Gan*'s reasonable to believe standard.

Here are a few of the factors that officers may wish to consider:

- Does the person appear to be impaired by alcohol or some other impairing substance?
- If the person is impaired by alcohol, was she driving near a residence or business where alcohol was served?
  - If the person appear to be extremely impaired and smells strongly of alcohol some distance away from any such establishment, the officer likely has a reasonable belief that alcohol is in the vehicle.
  - If the person is stopped close to a business or residence where alcohol is served and the officer sees no cups or containers in the car, the officer may not have a reason to believe alcohol is in the vehicle.
  - If the person is impaired by something other than alcohol, what is it and how long does it last?
    - If, for example, the officer has reason to believe the person is impaired by an inhalant that has a relatively short-lasting effect, the officer likely has reason to believe the substance is in the vehicle.
    - If the person admits to recently ingesting a controlled substance, the officer may have reason to believe the substance is in the vehicle.

Officers on patrol likely rely on additional factors. I'd love to hear what those are and whether vehicle searches following DWI arrests today are more or less routine than they were under *Belton*.