



State v. Fizovic and Searching Cars for Alcohol

Author : Shea Denning

Categories : [Evidence](#), [Motor Vehicles](#), [Search and Seizure](#)

Tagged as : [Arizona v. Gant](#), [Fizovic](#), [open container](#), [vehicle search incident to arrest](#)

Date : April 7, 2015

Author's Note: This post has been modified from its original version in response to a helpful comment by a reader.

An officer sees a man drink from a can of beer while the man drives through a public parking deck. The officer stops the man's car and sees the beer ~~bottle~~ can in plain view. He then asks the man to step out of the vehicle. May the officer open the car's console to search for additional evidence?

Yes, said the court of appeals today in [State v Fizovic](#), ___ N.C. App. ___, ___ S.E.2d ___ (2015). The console search in *Fizovic* turned up a loaded revolver, which the defendant--a convicted felon--was not allowed to possess. The court of appeals held that the search was justified as incident to the defendant's arrest, which occurred shortly after the search. The court further determined that that the search was permissible under *Arizona v. Gant*, 556 U.S. 332 (2009), as it was reasonable to believe that evidence relevant to the open container offense would be found in the car's console.

Facts.

There are a few more facts you should know. Billy Wyatt, the "officer" who stopped Fizovic was working for a private security company rather than a law enforcement agency. Wyatt was patrolling a Greensboro parking deck when he saw Fizovic drive up a ramp within the deck while drinking a beer. Wyatt stopped Fizovic and asked to see his driver's license. Fizovic showed him a resident alien card. When Wyatt asked again for Fizovic's driver's license, Fizovic said his license was in the center console of his car and began to reach for it. Concerned for his safety, Wyatt stopped Fizovic and asked him to step out of the car.

By this time, Officer Shaffer of the Greensboro Police Department had arrived on the scene along with another security company employee. Wyatt patted down Fizovic and asked him if he had drugs or weapons in the car. Fizovic said he did not.

Officer Shaffer then searched the center console, where he found a loaded .357 Taurus revolver. He did not find a driver's license. Wyatt asked Fizovic why he did not tell him there was a weapon in the car. Fizovic said it was because he was a convicted felon. Fizovic then was arrested for unlawful possession of a firearm by a felon and for the misdemeanor offense of [driving with an open container of alcohol](#).

The Issues.

Fizovic moved to suppress the evidence gathered in the console search. He argued that the search was unlawful on two grounds: (1) it was a "search incident to citation," rather than incident to arrest; and (2) the officer already had obtained sufficient evidence to prosecute the open container offense.

Fizovic did not challenge the trial court's determinations that Wyatt had probable cause to arrest Fizovic at the beginning of the stop for the open container violation, that the center console of Fizovic's car was large enough to hold

beer cans, and that it is common to find alcohol in the vehicles of drivers who are stopped for alcohol violations.

Search incident to arrest.

The court of appeals rejected Fizovic's contention that his car was searched incident to citation rather than arrest, relying on the fact that Fizovic *was arrested*--albeit after the search. The court cited as support its holding in *State v. Wooten*, 34 N.C. App. 85, 89 (1977), that "[w]here a search of a suspect's person occurs before or instead of after formal arrest, such search can be equally justified as 'incident to the arrest' provided probable cause to arrest existed prior to the search, and it is clear that the evidence seized was in no way necessary to establish the probable cause." Fizovic's failure to challenge the trial court's determination that Wyatt in fact had probable cause to arrest him before the search thus played a central role in the court's analysis. The appellate court deemed it irrelevant that, before the search was conducted, Wyatt intended only to cite Fizovic and not to arrest him.

Search for evidence of offense.

The court of appeals determined that Fizovic's circumstances were more like *State v. Foy*, 208 N.C. App. 562 (2010) (finding that officer's search of the defendant's truck following his arrest for carrying a concealed weapon was lawful as it was reasonable to believe that further evidence of the crime, such as another concealed weapon, could be found in the truck) than *State v. Johnson*, 204 N.C. App. 259 (2010) (search of vehicle following defendant's arrest for driving while license revoked was unlawful as it was not reasonable to believe evidence related to the offense would be found). Given Fizovic's arrest for an open container violation, the appellate court explained that an officer could reasonably have expected to find open containers of alcohol in the console of Fizovic's vehicle.

Circumstantial versus categorical approach.

The North Carolina Supreme Court in [State v. Mbacke](#), [another vehicle search incident to arrest case](#), stressed that "the 'reasonable to believe' standard required by *Gant* will not routinely be based on the nature or type of the offense of arrest." Instead, the court explained that "the circumstances of each case ordinarily will determine the propriety of any vehicular searches conducted incident to an arrest."

But just as one is left to wonder whether that is a distinction with a difference when it comes to searching for evidence of concealed weapons crimes (the offense of arrest in *Mbacke* and *Foy*), one might reasonably query post-*Fizovic* whether vehicle searches may categorically be conducted incident to arrest when the offense of arrest is a driving offense that involves alcohol.