

Is Supreme Court search decision applicable to drunk driving cases?

By Tracey A. Wood

In *Arizona v. Gant*, 129 S.Ct. 1710 (2009), the U.S. Supreme Court rejected a police policy of searching the vehicle of every person arrested, without consideration of whether there is any danger to police or whether evidence is likely be found in the vehicle.

In other words, vehicle searches incident to arrest are no longer automatically valid in Wisconsin once the arrestee is handcuffed and placed in the back of the squad car.

How does the *Gant* decision apply to drunk driving cases?

Under *Gant*, unless police can point to specific reasons they believe evidence related to the crime of arrest may be found in the vehicle, police may not search the vehicle. In many situations, contraband found in vehicles unrelated to the drunk driving arrest leads to other charges, such as possession of controlled substances.

In cases where this was done, defense counsel should be filing a motion to suppress all evidence found as a result of the search. This applies to arrests prior to *Gant*, as well as current ones, since the *Gant* court simply explained that courts and police have been reading the law incorrectly in the past – the Court did not state a new rule.

There is long-standing precedent governing the applicability of a new Supreme Court rule announced while a case is still pending – any case that was not concluded when *Gant* was announced is subject to the ruling.

Moreover, the *Gant* court did not permit a “good faith defense” to the unlawful search in that case. Thus, a good faith analysis may not save these searches. Wisconsin has permitted a good faith exception in some cases involving police relying on warrants that have later been found to be faulty; however, there is no Wisconsin case applying a good faith analysis to a case where there was no warrant.

There is also 7th Circuit case law for the proposition that good faith does not matter when dealing with searches that are not based on a warrant. (*U.S. v. 15324 County Highway E*, 332 F.3d 1070 (7th Cir. 2003).)

In that case, the court stated: “We decline to extend further the applicability of the good-faith exception to evidence seized during law enforcement searches conducted in naked reliance upon subsequently overruled case law.”

Some police agencies, such as the Wisconsin State Patrol, have changed their policies with respect to searches incident to arrests for operating a motor vehicle while under the influence of an intoxicant. But other police agencies are still conducting these searches after all arrests.

The result is that a lot more litigation can be expected in this area.