Legally Speaking
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The Fourth Amendment, Resuscitated

Most of the Fourth Amendment cases from the U.S. Supreme Court during the years of the Bush administration seemed to cut back its protections further and further, to a frightening degree. This has been especially true with car stops and ensuing searches. So the recently released case of Arizona v. Gant was a pleasant surprise, and with a most unusual majority. Justice Stevens wrote the opinion for the majority, joined by Justices Ginsburg, Souter, Thomas and Scalia.

Rodney Gant happened to answer the door of a house that several Tucson Arizona police officers were investigating for drug sales, based on an anonymous tip. Gant identified himself and told the police the owner would be back later. The officers left and ran a records check on Gant. They learned he had a suspended driver's license and an outstanding warrant for driving with a suspended license.

Later that evening, when the officers returned to the house and saw Gant pull into the driveway, when he got out of the car, they arrested him for driving with a suspended license. They handcuffed him and placed him in the back of a patrol car at the scene. They then searched his car and found cocaine and drug paraphernalia in the pocket of his jacket on the back seat. Gant moved to suppress the contraband seized from the car, claiming a Fourth Amendment violation. The trial court found the search to be valid, and Gant was convicted by a jury and sentenced to prison.

It's always useful in Fourth Amendment cases to go back to the basics. The general rule, of course, is that search warrants are needed for searches. Justice Stevens reminds us that "searches conducted outside the judicial process, without prior approval by a judge or magistrate, are *per se* unreasonable under the Fourth Amendment." But warrantless searches are permissible under certain circumstances. One clearly established permissible warrantless search is a search incident to an arrest.

What has "search incident to an arrest" meant in the context of traffic stops? What happens when the police arrest the occupant of a car? Based on past precedent of the high court, it pretty much meant the police could search the interior of the car, and any containers in the car, like purses or briefcases or packages. The reason for this has been twofold: for the officer's safety and to preserve evidence. The government urged the Court to continue to give the police this broad search power.

In the lead case that established this bright-line automobile-search rule, one lone police officer was dealing by himself with four persons under arrest, none of whom was secured at the scene. The continuing ability of those arrested to reach into the car was very real, so concerns about the officer's safety and the possibility of evidence disappearing were also very real. In that case a search of the entire car was upheld.

But in Gant's case the Court questioned whether such an extensive search is always justified in the face of an arrest of an occupant or recent occupant of a car and concluded it was not. The Court developed a two-part test for searches incident to an

arrest in this context. A search of the car is justified only when the person arrested is unsecured and within reaching distance of the interior of the car at the time of the search, or when the police have reason to believe the vehicle contains evidence of the offense for which the person was arrested. If, for example, the occupant of a car is arrested for a drug offense, a police search of the car is likely to turn up evidence related to the offense. The second part of the test was needed to pick up the vote of Justice Scalia, who did not accept the first part of the test alone. His dismissal of the concern for officer safety is surprising. But Scalia joined the majority with the addition of the second part of the test to avoid "a 4-1-4 opinion that leaves the governing rule uncertain."

In Gant's case, (where two other people had also been arrested before Gant arrived at the house,) there were five police officers, and each person arrested was secured in a separate police cruiser. So it was highly unlikely that Gant could access the interior of his car. And Gant was arrested for driving with a suspended license—an offense for which there wasn't likely to be any evidence, let alone evidence in the car. So the court found the search violated Gant's Fourth Amendment rights.

Justice Stevens wrote some language that sounds like the old days of the Earl Warren court: "A rule that gives police the power to conduct [such a] search whenever an individual is caught committing a traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, creates a serious and recurring threat to the privacy of countless individuals. Indeed, the character of that threat implicates the central concern underlying the Fourth Amendment—the concern

about giving police officers unbridled discretion to rummage at will among a person's private effects….To allow vehicle searches incident to any arrest would serve no purpose except to provide a police entitlement, and it is anathema to the Fourth Amendment to permit a warrantless search on that basis."

Leading the opposition was Justice Samuel Alioto, who wrote an impassioned dissent. What concerned him most was the fact that the police would have to learn new rules—for 28 years they had learned a bright line rule in the police academy that a warrantless search of the passenger compartment of a car is permissible when incident to a lawful arrest. Period. End of story. To him this old rule was clear and easy to apply, while the new one isn't.

Justice Stevens' rejoinder—"we have never relied on stare decisis (precedent) to justify the continuance of an unconstitutional police practice. "