

15.6 Did the Officer Act within the Scope of the Arrest or Search?

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A. Questioning Following Arrest

Following a lawful arrest, officers must give an in-custody defendant *Miranda* warnings before questioning him or her. For a discussion of *Miranda* principles, see *supra* § 14.3B, *Miranda* Violations.

B. Search Incident to Arrest

Of person. Officers may search a person incident to a lawful arrest of that person. See *United States v. Robinson*, 414 U.S. 218 (1973). Whether officers may search containers in the person’s possession is discussed further *infra* in “Containers” in § 15.6C, Other Limits on Searches Incident to Arrest.

Of vehicle. Previously, officers could search the passenger compartment of a vehicle, including containers found within, incident to a lawful arrest of an occupant. See *State v. Logner*, 148 N.C. App. 135 (2001) (warrantless search of defendant’s vehicle proper incident to arrest of passenger). The stated rationale for this rule was that officers needed a bright-line rule allowing them to search in areas where an arrestee might be able to use a weapon or destroy evidence. See *New York v. Belton*, 453 U.S. 454 (1981) (stating basic rule); see also *State v. Andrews*, 306 N.C. 144 (1982) (applying *Belton* principles to search of vehicle incident to arrest).

In *Arizona v. Gant*, 556 U.S. 332 (2009), the U.S. Supreme Court held that lower courts had read *Belton* too broadly and ruled that the permissible scope of a search of a vehicle incident to the arrest of an occupant of the vehicle was much narrower. The Court ruled that an officer may search the passenger compartment of a vehicle incident to the arrest of an occupant only if (1) the arrestee is within reaching distance of the passenger compartment and thus able to obtain a weapon or destroy evidence or (2) it is reasonable to believe evidence relevant to the crime of arrest may be found. *Gant* overrules North Carolina decisions allowing an unlimited search of the passenger compartment of a vehicle incident to arrest of an occupant of the vehicle. See *State v. Carter*, 191 N.C. App. 152 (2008) (holding that *Belton* does not require that search incident to arrest of

occupant of vehicle be only for evidence connected to the crime charged), *vacated and remanded*, 556 U.S. 1218 (2009), *on remand*, 200 N.C. App. 47 (2009) (suppressing evidence in light of *Gant* and lack of any other ground to uphold search).

Generally, once officers have secured an arrestee—by, for example, handcuffing the arrestee—they may not search the vehicle based on the first ground identified in *Gant*.

More post-*Gant* cases have involved the second ground for a search of a vehicle and focused on whether it was reasonable for the officer to believe evidence of the crime of arrest would be in the vehicle. *See State v. Mbacke*, 365 N.C.403 (2012) (analogizing the “reasonable to believe” standard in the second prong of *Gant* to the “reasonable suspicion” standard of a *Terry* stop). Typically, an arrest for a motor vehicle offense will not justify a search incident to arrest on the second *Gant* ground because it will not be reasonable for an officer to believe that evidence relevant to the motor vehicle offense may be found in the vehicle. *See* FARB at 252 (so stating). A number of cases have reached this result. *See Meister v. Indiana*, 556 U.S. 1218 (2009) (court summarily vacates state court decision allowing search of vehicle incident to arrest of driver for suspended driver’s license; case remanded for reconsideration in light of *Gant*); *State v. Johnson*, 204 N.C. App. 259 (2010) (disallowing search following arrest for suspended license); *State v. Carter*, 200 N.C. App. 47 (2009) (disallowing search following arrest for driving with expired registration tag and failing to notify Division of Motor Vehicles of change of address); *United States v. Davis*, 997 F.3d 191 (4th Cir. 2021) (where defendant was fully secured, search of car incident to his arrest for the crime of fleeing to elude arrest was improper).

It is also unlikely that officers would have grounds to search a vehicle incident to arrest of an occupant for an outstanding arrest warrant. *See* FARB at 226.

In cases involving gun and drug offenses, courts have found that the officers had a reasonable basis to believe evidence of the offense of arrest could be found in the vehicle. The N.C. Supreme Court has cautioned, however, that a search of a vehicle incident to arrest of an occupant may “not routinely be based on the nature or type of the offense of arrest and that the circumstances of each case ordinarily will determine the propriety of any vehicular searches conducted incident to an arrest.” *See State v. Mbacke*, 365 N.C. 403 (2012) (upholding search following arrest for carrying concealed weapon); *State v. Watkins*, 220 N.C. App. 384 (2012) (upholding search following arrest for possession of drug paraphernalia); *State v. Foy*, 208 N.C. App. 562 (2010) (upholding search following arrest for carrying concealed weapon).

C. Other Limits on Searches Incident to Arrest

Arizona v. Gant, discussed in subsection B., above, significantly limits the circumstances in which officers may search a vehicle incident to the arrest of a vehicle’s occupant. Additional limits on searches of people and vehicles incident to arrest are discussed below, based on additional case law and *Gant*.

Citations. Officers may not search a person or vehicle incident to issuance of a citation if they do not arrest the person. *See Knowles v. Iowa*, 525 U.S. 113 (1998); *State v. Fisher*, 141 N.C. App. 448 (2000) (defendant had been issued citation for driving while license revoked but had not been placed under arrest; search could not be justified as search incident to arrest); *see also Sibron v. New York*, 392 U.S. 40, 63 (1968) (“It is axiomatic that an incident search may not precede an arrest and serve as part of its justification.”); FARB at 250 (search may be made before actual arrest if arrest is made contemporaneously with search, but whatever is found during search before formal arrest cannot be used to support probable cause for the arrest).

Area and people. Cases before *Gant* permitted a search of the passenger compartment of a vehicle incident to arrest of an occupant of a vehicle, but not other areas, such as the vehicle’s trunk, and not other occupants of the vehicle.

Gant does not appear to modify these limitations. *See also Owens v. Kentucky*, 556 U.S. 1218 (2009) (court summarily vacates state court decision authorizing automatic pat down of passengers when officers arrest a vehicle occupant and are preparing to conduct search incident to arrest; case remanded for reconsideration in light of *Gant*); *State v. Schiro*, 219 N.C. App. 105 (2012) (search of trunk of vehicle not valid as search incident to arrest of vehicle occupant; however, search was valid based on defendant’s consent).

Containers. Before *Gant*, the North Carolina Court of Appeals held that officers may not search locked containers incident to arrest of a person. *See State v. Thomas*, 81 N.C. App. 200 (1986) (officers could not search, incident to arrest, locked suitcase arrestee was carrying); *cf. State v. Brooks*, 337 N.C. 132 (1994) (officers may search locked compartments within vehicle as part of search incident to arrest).

Gant likely limits searches of containers, whether locked or unlocked or whether following arrest of a person or arrest of an occupant of a vehicle. If officers cannot satisfy either ground identified in *Gant* for a search incident to arrest—that is, if the arrestee was secured and could not reach the container, and there was not a reasonable basis to believe that the container contained evidence related to the offense of arrest—officers may not be able to search containers incident to arrest. In *United States v. Davis*, 997 F.3d 191 (4th Cir. 2021) the Fourth Circuit applied this prong of the *Gant* rule to a backpack outside of the vehicle, ruling that its search incident to the defendant’s arrest was improper because the defendant was fully secured on the ground with his hands handcuffed behind his back. This holding is consistent with an earlier state decision. *State v. Thomas*, 81 N.C. App. 200 (1986) (where defendant was in custody, search of locked luggage incident to arrest was invalid); *see also* Shea Denning, [United States v. Davis: Fourth Circuit Extends Gant to Containers Generally](#), N.C. CRIM. L., UNC SCH. OF GOV’T BLOG (May 27, 2021).

Cell phones. In *Riley v. California*, 573 U.S. 373 (2014), the U.S. Supreme Court disavowed application of the search incident to arrest exception to cell phones. Thus, a search warrant or valid consent is generally required to search a cell phone. *But cf. United States v. Kolsuz*, 890 F.3d 133 (4th Cir. 2018) (permitting forensic analysis of

cell phones based on reasonable suspicion in the context of a customs search at an international airport under the border search exception).

Strip search during search incident to arrest. A roadside strip search incident to arrest of a person may be impermissible unless probable cause to search and exigent circumstances exist. *See State v. Battle*, 202 N.C. App. 376, 387–88 (2010) (opinion for court so states); *accord State v. Fowler*, 220 N.C. App. 263 (2012) (adopting language from *Battle*). For a discussion of the validity of strip searches based on probable cause, see *infra* “Strip searches based on probable cause” in § 15.6D, Probable Cause to Search Person.

Recent occupancy. In *Thornton v. United States*, 541 U.S. 615 (2004), a majority of the Court held that the *Belton* doctrine allowed a search of the passenger compartment of a vehicle after arrest of an “occupant” or “recent occupant.” In *Thornton*, the Court found that the defendant was a recent occupant when he parked his car and exited right before the officer could pull the car over. *Thornton* appears to remain good law after *Gant*. Thus, if a person is not a “recent occupant” of the vehicle in question when approached by officers, a search of the vehicle incident to arrest of the person remains impermissible. *See State v. Dean*, 76 P.3d 429 (Ariz. 2003) (officers could not search defendant’s car incident to arrest; defendant was not “recent occupant” of car when he had not occupied car for some two-and-one-half hours and his arrest occurred not in close proximity to automobile, which was parked in his driveway, but inside his residence). If a person is a recent occupant, officers still must meet one of the two grounds identified in *Gant* for a search of a vehicle incident to arrest of the person.

Passenger belongings. A passenger has standing to contest a search of his or her belongings within a vehicle, such as a purse, incident to arrest of an occupant of the vehicle. *See State v. Mackey*, 209 N.C. App. 116 (2011) (recognizing principle but holding that passenger asserted no possessory interest in vehicle or contents and did not have standing to contest search of vehicle resulting in discovery of weapon under seat).

D. Probable Cause to Search Person

Person. Officers may conduct a warrantless search of a person whom they have not arrested if both probable cause to search and exigent circumstances exist. *See, e.g., State v. Williams*, 209 N.C. App. 255 (2011) (probable cause existed to believe defendant possessed illegal drugs and exigent circumstances existed based on belief that defendant was attempting to swallow them; permissible for officer to conduct warrantless search of the defendant’s mouth by grabbing him around the throat, pushing him onto the hood of a vehicle, and demanding that he spit out whatever he was trying to swallow); *State v. Yates*, 162 N.C. App. 118 (2004) (officer had probable cause to search defendant based on strong odor of marijuana about defendant’s person; exigent circumstances justified immediate warrantless search).

Containers. Officers may conduct a warrantless search of a container found on a person whom they have not arrested if both probable cause to search *and* exigent circumstances

exist. If exigent circumstances do not exist, they must obtain a search warrant. *See State v. Simmons*, 201 N.C. App. 698 (2010) (officers did not have probable cause to search bag or vehicle based on defendant's statements that bag contained cigar guts); FARB at 242–43 (discussing rule and exceptions).

Strip searches based on probable cause. Because of their intrusiveness, roadside strip searches require a greater justification than other warrantless searches based on probable cause. Officers must have specific probable cause that the defendant is hiding the items (usually, drugs) on his or her person. Further, there must be “exigent circumstances that show some significant government or public interest would be endangered were the police to wait until they could conduct the search in a more discreet location.” *State v. Fowler*, 220 N.C. App. 263 (2012) (citation omitted). The strip search also must be conducted in a reasonable manner. *See also supra* “Strip search during search incident to arrest” in § 15.6C, Other Limits on Searches Incident to Arrest (applying similar standard).

Appellate judges have divided over whether strip searches meet these higher standards. *Compare State v. Battle*, 202 N.C. App. 376 (2010) (finding strip search unconstitutional), *with State v. Robinson*, 221 N.C. App. 266 (2012) (stating that showing of exigent circumstances was not required where officer had specific basis for believing weapons or contraband were under defendant's clothing) *and Fowler*, 220 N.C. App. 263 (finding exigent circumstances and upholding strip search). For more on strip searches, see Bob Farb, [North Carolina Court of Appeals Issues Ruling on Strip Search by Law Enforcement Officers](#), N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Feb. 23, 2016).

E. Probable Cause to Search Vehicle

Generally. Officers may conduct a warrantless search of an automobile, including the trunk and closed containers, if they have probable cause to believe the objects of the search may be located there. The rationale for what is known as the automobile exception to the warrant requirement is that cars are capable of being moved quickly and people have a reduced expectation of privacy in cars. *See California v. Acevedo*, 500 U.S. 565 (1991) (stating general standard); *State v. Holmes*, 109 N.C. App. 615 (1993) (to same effect); *see also Florida v. White*, 526 U.S. 559 (1999) (police do not need warrant to seize vehicle from public place when they have probable cause to believe that vehicle itself is forfeitable contraband). If probable cause exists to search an automobile, officers may conduct an immediate search at the scene, or a later search at the police station, without a warrant. *See Acevedo*, 500 U.S. at 570.

The scope of a warrantless search of a vehicle based on probable cause is broad but not unlimited. “The scope of a warrantless search of an automobile . . . is defined by the object of the search and the places in which there is probable cause to believe that it may be found.” *See United States v. Ross*, 456 U.S. 798, 824–25 (1982) (holding that “[i]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search; also

observing that “[p]robable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab”).

Passenger belongings. In *Wyoming v. Houghton*, 526 U.S. 295 (1999), the Court held that officers with probable cause to search a car may search passengers’ belongings found in the car that are capable of concealing the object of the search.

Probable cause to search a car and its contents does not necessarily authorize officers to search passengers themselves. Nor does it necessarily authorize searches of passengers’ belongings in other contexts—for example, when the driver but not the passenger consents to a search. *See supra* § 15.5D, Consent.

Seizure of object. Before seizing an object found during a search of a vehicle, officers must have probable cause to believe that the object constitutes evidence of a crime. *See State v. Bartlett*, 130 N.C. App. 79 (1998) (no probable cause to seize plastic-like substance found in car, which upon later laboratory analysis turned out to be controlled substance, because officers admitted that they did not know what substance was at time of seizure).

Drug cases. In *Maryland v. Dyson*, 527 U.S. 465 (1999), the Court reaffirmed that a finding of probable cause that a vehicle contains contraband satisfies the automobile exception to the search warrant requirement. At issue in such cases are what circumstances amount to probable cause to search and where officers may search. *See generally State v. Poczontek*, 90 N.C. App. 455 (1988) (officer lacked probable cause to search car for drugs based on informant’s tip and officer’s observations after stop).

Existing case law holds that the odor of marijuana emanating from a vehicle gives an officer probable cause for a warrantless search of the vehicle for marijuana. *See State v. Smith*, 192 N.C. App. 690 (2008) (so holding). Officers may search in areas of the car where they reasonably believe marijuana may be found. *See State v. Toledo*, 204 N.C. App. 170 (2010) (officer noted odor of marijuana from spare tire in the luggage area after defendant had validly consented to a search of the vehicle; after conducting a “ping test” by pressing the tire valve of the spare tire and noting a very strong odor of marijuana, officer searched second spare tire located under the vehicle; court finds that after first ping test, officer had probable cause to search second tire).

These cases are subject to challenge given the existence of legal hemp products in North Carolina that are easily confused with illegal marijuana. *See State v. Parker*, ___ N.C. App. ___, 860 S.E.2d 21 (2021) (questioning continued viability of rule that the sight or odor of marijuana provides probable cause in light of legal hemp products which are identical in sight and odor to marijuana); *see also* Phil Dixon, [Hemp or Marijuana?](#), N.C. CRIM. L., UNC SCH. OF GOV’T BLOG (May 21, 2019).

Probable cause to search a vehicle for drugs does not necessarily give officers probable cause to search recent occupants of the vehicle. *See State v. Smith*, 222 N.C. App. 253 (2012) (drug dog’s positive alert to a vehicle does not give officers probable cause to

search recent occupants of the vehicle); *see also Bailey v. United States*, 568 U.S. 186 (2013) (search warrant does not justify the detention of occupants beyond the immediate vicinity of the premises covered by a search warrant; in this case, the defendant left the premises before the search began and officers waited to detain him until he had driven about one mile away, which was impermissible in absence of other grounds for detention). *But cf. State v. Mitchell*, 224 N.C. App. 171 (2012) (possession of marijuana blunt by passenger gave officer probable cause to search car in which passenger was riding).

F. Inventory Search

Arrestees. Officers may search and inventory possessions of arrestee. *See* FARB at 229.

Vehicles. Officers may *impound* a vehicle if pursuant to departmental policy and grounds for impoundment exist, such as the need to safeguard the vehicle and its contents. Officers may *inventory* the vehicle and its contents if pursuant to departmental policy. *See State v. Phifer*, 297 N.C. 216 (1979) (failure to follow standardized procedure; inventory search suppressed); *State v. Peaten*, 110 N.C. App. 749 (1993) (inadequate grounds to impound vehicle; inventory search suppressed); FARB at 261–62 (discussing impoundment and inventory of vehicles).

Pretext. Inventory searches may be challenged as pretextual. *See supra* § 15.3H, Pretext.