

WISCONSIN SUPREME COURT
TUESDAY, APRIL 13, 2010
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed a Grant County Circuit Court decision, Judge George S. Curry, presiding.

2007AP1894-CR

[State v. David A. Dearborn](#)

In this case, the Wisconsin Supreme Court is asked to examine the search-incident-to-arrest doctrine and how it applies to a vehicle search in light of the U.S. Supreme Court's decision in Arizona v. Gant, 129 S. Ct. 1710 (2009).

Gant is viewed as limiting the broader powers that peace officers previously had to search a vehicle after arresting the vehicle's occupant. Gant holds that once an arrestee is safely in custody and unable to gain access to his vehicle, the search of the vehicle incident-to-arrest doctrine is no longer available.

Some background: A state Department of Natural Resources warden arrested David A. Dearborn for operating a vehicle after revocation. Dearborn resisted, fled, and was eventually subdued with the help of a state trooper.

Once Dearborn was handcuffed and placed in the squad, the warden searched the passenger compartment of Dearborn's vehicle and found a container with a small amount of marijuana and drug paraphernalia. Dearborn was charged with assaulting or otherwise resisting or obstructing a warden, possession of the active ingredient in marijuana and possession of drug paraphernalia.

The jury found Dearborn not guilty of possession of drug paraphernalia, but guilty of the other two charges. The circuit court denied Dearborn's motion to suppress the evidence discovered in his vehicle. Dearborn appealed, and the Court of Appeals affirmed.

As an initial matter, the state and the public defenders agree that Gant is a clear break in precedent which applies to this case, as well as to State v. Littlejohn (also scheduled for oral argument today).

Dearborn states that the Court of Appeals' decision relied on cases prior to Gant, and that no reasonable basis exists to support the Court of Appeals decision in his case.

The state agrees that Gant affects the analysis to be applied to the search-incident-to-arrest doctrine. However, it asks the Supreme Court to review whether the evidence should not be suppressed because the good-faith exception to the exclusionary rule applies, or, more broadly because the exclusionary rule is not applied when it will not serve to deter police misconduct. There is no dispute that the search was lawful under then applicable federal and state case law, prior to the decision in Gant.

Dearborn also asks the Supreme Court to review the use of a jury instruction that did not require the jury to unanimously agree as to whether Dearborn specifically resisted or obstructed.

The Court of Appeals said that the threshold question in Dearborn's unanimity challenge was whether the violation of Wis. Stat. § 29.951 was a single offense with multiple modes of commission or were multiple offenses.

Dearborn argues that the jury instructions for § 961.41 provide separate instructions for “resisting” and “obstructing.” See Wis. JI – Criminal 1765, 1766. He says that if the Court of Appeals’ reasoning is applied to § 961.41, the separate jury instructions are superfluous.

The state contends the fact that Wis. Stat. § 29.951 contains assault, resist and obstruct in one sentence in the disjunctive, with only one penalty provided, leads to the conclusion that the Legislature intended one crime with alternative modes of commission, upon which the jury did not have to be unanimous.