



THE DOCKET

The Newsletter of the Michigan Association of District Court Magistrates

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THE IMPACT OF 'ARIZONA V GANT'

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On April 21, 2009, the United States revamped the law regarding searches of vehicles incident to the arrest of an occupant. All of law enforcement and prosecutors should familiarize themselves with the ruling of this case, as it is unquestionably a landmark case in the area of criminal law.

Facts of the Case

The Tucson Police Department acted on a tip that narcotics activity was taking place at a residence. The police conducted a records check of one of the residents, Rodney Gant, and learned that Gant had an outstanding warrant for driving with a suspended license. Gant drove up to the residence while the police were there.

As he stepped out of his vehicle, an officer shined a flashlight on the car, called to him, and Gant walked toward the officer. Gant was about 8 to 10 feet from his car when the officer placed him under arrest, handcuffed him, and placed him into the back of a nearby patrol car. After his arrest, officers searched Gant's vehicle and found cocaine in the pocket of a jacket in the car and a weapon.

Gant was charged with unlawful possession of cocaine for sale and unlawful possession of drug paraphernalia. He filed a motion to suppress, which the court denied on the ground that the

search of his car was lawful because it was a search incident to his arrest, pursuant to the United States Court decision of *New York v. Belton* (In *Belton*, the Supreme Court held that the risks to officer safety and to the preservation of evidence inherent in the arrest of a vehicle's recent occupant justified a contemporaneous warrantless search of the automobile's passenger compartment incident to the arrest). Gant was convicted of the charges, and he was incarcerated for 3 years.

The Arizona Court of Appeals reversed, and ruled that the defendant's motion to suppress should have been granted. The court further ruled that *Belton* is distinguishable because Gant stopped his vehicle and voluntarily exited his vehicle. By contrast, in *Belton*, the police confronted the suspect while he still was in his car. The Arizona Supreme Court ruled that the post-arrest search of his car violated the Fourth Amendment, and therefore, held the search to be illegal.

The Court's Ruling

The Court ruled that warrantless searches "are per se unreasonable," subject only to a few specifically established and well-delineated exceptions.

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2009 Annual Conference
Sept. 30 - Oct. 2, 2009
Park Place Hotel, Traverse City, MI
<http://www.park-place-hotel.com>

Our agenda for the 2009 Conference will include a presentation by Federal Magistrate Mark Randon. Magistrate Randon was a District Court Judge in the 36th District Court before his appointment, and will give an update on setting bond. The Honorable Elizabeth Hines of the 15th District Court will follow with information on setting bond on domestic violence cases. We are also pleased to have with us K.C. Steckelberg from the Prosecuting Attorney's Association of Michigan, who will brief us on the medical marijuana law. Jill Booth from the State Court Administrator's Office will present us with information regarding upcoming changes in statutes and court procedure. And back by popular demand, Sgt. Lance Cook of the Michigan State Police, Traffic Services Section, will enlighten us on the latest and greatest traffic laws. Hope to see you all there!

**The Standardization of Field
Sobriety Tests**

An Article by Judge John M. Priester
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In "The Man With Two Brains"ⁱⁱⁱ Steve Martin's character is pulled over by a police officer in Austria for speeding. The officer suspects that Steve Martin has been drinking so he has Steve Martin submit to sobriety tests.

The first test is to walk a straight line away from the officer. On the way back the officer instructs Steve Martin to walk on his hands, then on one hand. The officer then orders Steve Martin to roll over, turn over and flip flop. The final test has Steve Martin simultaneously juggling three oranges, tap dancing and singing a song. Steve Martin responds, "Damn, your drunk tests are hard!"

Austria apparently has not adopted standardized field sobriety tests.

Walking, Writing and Coins

Prior to 1980, states and local police departments utilized many tests to help officers determine if a driver was under the influence. These tests were wide-ranging and non-standardized. Tests utilized were touching a finger to the nose, walking a straight line and picking up coins.ⁱⁱ Other jurisdictions had the suspect write his name and their address on paper.ⁱⁱⁱ Suspects were also instructed to walk and pick up a rock on the ground.^{iv} Additional tests utilized were subtraction, backwards counting and letter cancellation.^v

Defendants challenged these tests as not being competent evidence. The tests were attacked as being "without any scientific basis; having no proven correlation to the blood alcohol level of the person being tested; having no established and quantifiable method of evaluation, and thus are purely subjective; and finally being not generally accepted and reliable method of ascertaining the information sought to be found."^{vi}

Standardizing Standard Testing

In response to these challenges, in 1975, the National Highway Traffic Safety Administration (NHTSA) began to sponsor research that led to the development of a driving while impaired detection guide for officers.^{vii} The goal of the studies was to "expose the current generation of law enforcement officers in the U.S. to information critical to DWI enforcement by providing a systematic, scientifically valid, and defensible approach to on-the-road DWI detection."^{viii}

NHTSA sponsored research to evaluate the field sobriety tests being utilized by law enforcement officers to determine their effectiveness and the "development of a standardized battery of tests for officers to administer to assess driver impairment after an enforcement stop has been made."^{ix}

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Arizona v Gant *Continued from page 1*

The Court further ruled that officers may search a vehicle incident to arrest only if (1) the arrestee is unsecured and within reaching distance of the passenger compartment when the search is conducted; or (2) it is reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle.

What The Ruling Means for Law Enforcement?

In essence, the United States Supreme Court's ruling authorized a search of a vehicle incident to an arrest under only two circumstances.

First, when the arrestee is unsecured and within reaching distance of the passenger compartment when the search is conducted. The Court stated that it will be a rare case in which an officer is unable to fully effectuate an arrest so that an arrestee has a realistic possibility of access to the vehicle. Thus, the normal case in which an officer secures the arrestee with handcuffs and places him/her in a police vehicle will not satisfied this particular circumstance.

Second, whether it is reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle. For motor vehicle offenses, such as Operating While Intoxicated, there may be valid grounds for believing that there is relevant evidence to the offense that may exist in the vehicle (i.e. controlled substances or alcohol containers used to drink or otherwise orally ingest them). How recent the offense was committed will be important in determining the "reasonable to believe" standard.

If neither circumstance exists to allow a search of the vehicle, there are other Fourth Amendment exceptions that may authorize a warrantless search of the vehicle.

These exceptions are as follows:

1. Probable cause to believe that evidence of

criminal activity exists in the vehicle;

2. Reasonable suspicion that a person is dangerous and might access the vehicle to gain immediate control of weapons;

3. Impoundment and inventory of a vehicle, which must be conducted under standard operating procedures that are reasonable under the Fourth Amendment;

4. Consent to search.

Law enforcement must keep this new standard in mind. The *Belton* rule has been curtailed and a number of searches that previously would have been held to be legal would now likely be found to be unconstitutional.

Sobriety Tests *Continued from page 2*

A NHTSA-sponsored study looked at the psychophysical tests for DWI arrests in 1977.^x The study evaluated currently-used sobriety tests, developed more sensitive and reliable measures and attempted the standardization of test administration.^{xi}

Six field tests were chosen and evaluated after an exhaustive review of all field tests used. The tests included Alcohol Gaze Nystagmus, Walk and Turn (Heel-Toe), Finger-to-Nose, One-Leg Stand, Finger County and Tracing. While all tests were found to be alcohol sensitive, the data analysis led the study to recommend a reduced battery of three tests which include the examination of balance (One-Leg Stand) and walking (Walk-and-Turn), as well as the jerking nystagmus movement of the eyes (Alcohol Gaze Nystagmus).^{xii}

In 1979 and 1980, a NHTSA-sponsored study did a two-stage analysis. In the first stage of the project, "the literature was reviewed, DWI detection experts were interviewed, a large sample of arrest reports was analyzed, and an on-the-road study of DWI detection was conducted to obtain data on the relative discriminability and frequency of occurrence of visual detection cues.

The end product of the first phase was a set of

conclusions about DWI detection, and a prototype DWI detection guide designed to facilitate application of the research findings to on-the-road detection of DWI.”^{xiii} In the second phase of the project a Drunk Driver Detection Guide was developed “and a field test was conducted to evaluate and verify the Guide.”^{xiv}

In 1981 researchers published the “Development and Field Test of Psychological Tests for OWI Arrest” study.^{xv} This study’s goal was to create a battery of field sobriety tests, and then have the effectiveness of the tests evaluated in the laboratory and in the field.^{xvi} The study determined that the “best” tests included the horizontal gaze nystagmus test, the walk and turn test, and the one-legged stand test, as these tests “could correctly classify more than 83% of the evaluation study participants with respect to whether they were above or below a BAC of 0.10%.”^{xvii}

The horizontal gaze nystagmus test is a field sobriety test that evaluates the driver’s pupils. “Nystagmus is an involuntary jerking or bouncing of the eyeball that occurs when there is a disturbance of the vestibular (inner ear) system or the oculomotor control of the eye. Horizontal gaze nystagmus (HGN) refers to a lateral or horizontal jerking when the eye gazes to the side. In the impaired driver context, alcohol consumption . . . hinders the ability of the brain to correctly control eye muscles, therefore causing the jerking or bouncing associated with the HGN.”^{xviii} More information on the HGN can be found on this link:

http://www.ndaa.org/pdf/sci_law2.pdf.

The walk and turn test and the one-legged stand test evaluate a driver’s balance. In the walk and turn test the suspect takes nine heel-to-toe steps on a line, turns around keeping one foot on the line, and returns in nine heel-to-toe steps.^{xix} In the one-leg stand test the subject is asked to raise one leg about six inches off the ground and hold that position while counting rapidly from 1001 to 1030.^{xx}

The 1981 study found that the recommended battery of field sobriety tests had the following levels of accuracy when determining a BAC of 0.10:^{xxi}

HGN: 77%
Walk and Turn: 68%
One Leg Stand: 65%
Combined: 81%

Follow Up Study

As states began to lower the legal limit to determine intoxication from a BAC of 0.10 to 0.08, NHTSA commissioned two studies to determine the validity of the standardized field sobriety tests at the lower BAC of 0.08.^{xxii} This study validated the accuracy of the standardized tests at the lower BAC level of 0.08. The Stuster & Burns study found the field sobriety tests to be accurate at the following levels for a BAC of 0.08:^{xxiii}

HGN: 88%
Walk and Turn: 79%
One Leg Stand: 83%
Combined: 91%

The study’s conclusion states that the “results of this study provide clear evidence of the validity of the Standardized Field Sobriety Test Battery to discriminate above or below 0.08 percent BAC. Further, study results strongly suggest that the SFSTs also accurately discriminate above or below 0.004 percent BAC.”^{xxiv}

Thus, through the standardization of the field sobriety testing, officers in the field are able to more accurately gauge the level of an intoxicated driver. By disregarding tests that did not have a foundation based upon science, officers are able to utilize the three tests approved by NHTSA to determine with an accuracy of 91% if a driver is impaired.

See footnotes at the end of the Newsletter, pg. 6.

In The Spotlight...

36th District Court Magistrates

Magistrate Renee R. McDuffee, from the 36th District Court for the City of Detroit, recently wrote an article for a local bar association that educated local attorneys of the job duties of a District Court Magistrate.

There are 6 Magistrates in the 36th District Court, all of whom are Attorneys, and are all residents of the City of Detroit. Each Magistrate has a 6-week rotation which includes: 4 weeks of Informal Traffic Hearings, 1 week of Small Claims Hearings, 1 week of Felony Arraignments, and one ½ day of parking every 6 weeks.

The 2008 statistics reflect that the 6 of us were assigned a total of 90,000 traffic infractions (15,000 each), conducted 14,300 Felony Arraignments (about 2,400 each) and disposed of most of the 5,091 Small Claims cases filed by conducting hearings and rendering decisions on them (about 850 each.)

Thanks Renee, for educating the local bar as to what District Court Magistrates do on a regular basis.

Proposed Legislation to Watch

HB 4098 Would eliminate Driver Responsibility Fees.
SB 317

HB 4101 Would amend Driver Responsibility Fees to one-year assessments instead of two-year.

HB 4141 Would add \$10 fee to all alcohol-related convictions to be paid to Supreme Court for drug treatment courts.

HB 4163 Would require use of headlights during periods of precipitation.

HB 4267 Would prohibit courts from furnishing to the public a copy of an arrest or bench warrant until it is returned (arrest made).

HB 4322 Would create a new 30-day misdemeanor for providing false information regarding court-ordered community service.

Passed House – 6/10/09

HB 4343 Would amend window tint law to: (1) allow person to operate vehicle with tint if they reside with the owner who has doctor letter and have permission from the owner; (2) allow other person to operate vehicle with tint if the owner who has a doctor letter is a passenger in the vehicle; and (3)

require a new SOS sticker in the back window of a vehicle that has tint and owner has the required letter from a doctor.

HB 4360 Would codify the extension of the seat belt usage exemption to newspaper delivery personnel, and defines “frequent stops” as a series of stops with at least 1 stop within every ½ mile of travel.

HB 4362 Would prohibit use of cell phones while operating school bus.

HB 4369 Would prohibit use of mobile phones while operating a motor vehicle, unless hands-free or under certain exceptions.

HB 4370,
4394 Would prohibit messaging on an electronic wireless device while operating a motor vehicle.

HB 4482
SB 80 Would amend fleeing and eluding offenses to add a 2-year mandatory minimum to all degrees.

HB 4493 Would prohibit all first year drivers from having more than 1 passenger under 18 years of age other than family member in car.

HB 4495 Would remove the horsepower threshold from the definition of a moped.

HB 4604
SB 127 Amend Driver Responsibility Fees - add for certain offenses, and eliminate for certain offenses. Also, payment options amended.

HB 4648 Would regulate motor vehicle pursuits by police officers.

HB 4705
& 4706 Would create an Indigent Defense Counsel Fund, and require Courts to impose a 5% bail surcharge and sliding scale probation fee (not to exceed \$135), and transmit monies to the Treasury Dept. for the Fund.

HB 4748 Would require police officers to ascertain and indicate the race or ethnicity of a person to whom a traffic citation is issued.

HB 4978 Would prohibit lane changes in an intersection.

HB 5087 Would modify the definition of off-road recreation vehicle. **Passed House – 6/23/09**

- HB 5123 Would require district court magistrates to be licensed attorneys.
- HB 5140 Would require removal from roadway of motor vehicle involved in accident.
- HB 5143 Would revise provision relating to establishment of speed limits.
- HB 5254 Would abolish motorcycle helmet requirement.
- HB 5277 Would extend expiration of driver's licenses or permits to the next business day if expires on a government shutdown day.
- SB 473 Would require (whenever possible) the use of 2-Way Interactive Video in certain proceedings.
- SB 566 Would require written notification of the applicability of a driver responsibility fee on a traffic citation written for no proof of insurance.

Footnotes from Field Sobriety Article, pg. 2-4.

- ⁱ "The Man With Two Brains" (Warner Bros., 1983).
- ⁱⁱ *People v. Miller*, 113 Ill.App.3d 845, 447 N.E.2d 1060, 1061 (Ill.App.4 Dist., 1983).
- ⁱⁱⁱ *City of Piqua v. Hinger*, 15 Ohio St. 2d 110, 238 N.E.2d 766 (Ohio 1968).
- ^{iv} *Burris v. State*, 156 Tex.Crim. 485, 244 S.W.2d 211, 212 (Tex.Cr.App. 1951).
- ^v Tharp, Burns & Maskowitz, *Development and Field Test of Psychophysical Tests for DWI Arrest* (1981) Final Report, DOT-HS-805-864, NHTSA.
- ^{vi} *State v. Arsenault*, 115 N.H. 109, 336 A.2d 244, 245 (N.H. 1975).
- ^{vii} *Development of a Standardized Field Sobriety Test*, SFST Training Management System, www.nhtsa.gov.
- ^{viii} *Id.*
- ^{ix} *Id.*
- ^x Burns, M. and Moskowitz, H. (1977). *Psychophysical Tests for DWI Arrest*. U.S. Department of Transportation, National Highway

Traffic Safety Administration, DOT-HS-5-01242, Washington, D.C.

^{xi} *Id.*

^{xii} *Id.*

^{xiii} Harris, D.H., Dick, R.A., Casey, S.M., and Jarosz, C.J. (1980), *The Visual Detection of Driving While Intoxicated*. U.S. Department of Transportation, National Highway Traffic Safety Administration, DOT-HS-7-1538, Washington, D.C.

^{xiv} *Id.*

^{xv} Tharp, Burns & Maskowitz, *Development and Field Test of Psychophysical Tests for DWI Arrest* (1981) Final Report, DOT-HS-805-864, NHTSA.

^{xvi} *Id.*

^{xvii} *Id.*

^{xviii} National Traffic Law Center, *Horizontal Gaze Nystagmus: The Science and the Law*. American Prosecutor Research Institute.

^{xix} Tharp, Burns & Maskowitz, *Development and Field Test of Psychophysical Tests for DWI Arrest* (1981) Final Report, DOT-HS-805-864, NHTSA

^{xx} *Id.*

^{xxi} *Id.*

^{xxii} Stuster, J. and Burns, M. (1998). *Validity of the Standardized Field Sobriety Test Battery at BACs Below 0.10*. U.S. Department of Transportation, National Highway Traffic Safety Administration, DOT-HS-808-654, Washington, D.C.

^{xxiii} *Id.*

^{xxiv} *Id.*