NOT FINAL UNTIL TIME EXPIRES FOR REHEARING
AND, IF FILED, DETERMINED

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY

STATE OF FLORIDA,

Appellant,

v.

DANIEL FRANCIS,

Appellee.
_____/

Appeal No.: CRC 10-00032APANO
UNC No.: ~~522009MM034762XXXXNO~~
522010AP000032XXXXCR

Opinion filed _____.

Appeal from an Order Granting Motion to Suppress
entered by the Pinellas County Court
County Judge James V. Pierce

Erin M. Whittemore, Esquire
Attorney for Appellant

Frank Lauderback, Esquire
Attorney for Appellee

ORDER AND OPINION

ANDREWS, Judge.

THIS MATTER is before the Court on Appellant, State of Florida's appeal from a decision of the Pinellas County Court to granting Appellee's Motion to Suppress. After reviewing the briefs and record, this Court reverses the judgment of the County Court and remands for further proceedings consistent with this court's order.

Factual Background and Trial Court Proceedings

Officer Allan Charles McTavish is a veteran of the St. Petersburg Police Department. At hearing on the Motion to Suppress Officer McTavish testified that he has worked as a police officer for almost twenty six (26) years. His current assignment is that of a field training officer. During his tenure as a police officer he worked as a member of the "DUI Squad" and as an undercover vice and narcotics officer. He is certified in "advance narcotics investigations and tactics." He has conducted a minimum of 70 DUI investigations during his career.

On December 6, 2009 at approximately 9:00 a.m., Officer McTavish along with officer Demesmine were dispatched to a convenience store where there was a person "passed out" inside of a vehicle. The store clerk advised the officers that the Appellee was passed out behind the wheel of the car for 20 minutes prior to the arrival of law enforcement. Upon arrival Officer Demesmine was handed the keys to the car by paramedics who advised Officer Demesmine the car was running when they arrived. Officer Demesmine made contact with the driver. Officer Demesmine believed he observed signs of impairment and asked Officer McTavish to confirm his suspicions. Officer McTavish similarly observed signs of impairment which included "very slurred" speech, dilated pupils and the Appellee was incoherent. Officer McTavish described the Appellee as "quite bluntly, he was basically out of it." All of these signs of impairment were observed as the Appellee sat in his car. Officer McTavish testified that he believed the Appellee to be DUI. Officer McTavish indicated that he tried to determine from the Appellee's breath if he was under the influence of alcohol however his breath revealed no signs of alcohol consumption. Officer McTavish testified "based on the Appellee's

demeanor, I suspected that he was under the influence of some other substance other than alcohol itself." The officer then asked the Appellee for his driver's license. He was not able to produce a license but did produce a Florida ID card. A check of the card revealed that the Appellee's license was suspended. The Appellee was taken into custody for driving on a suspended license. Officer McTavish testified that "[o]nce out of the vehicle, he was staggering. His speech was slurred; eyes dilated, glossy, red; and [he] gave me specific indications that his normal faculties were impaired." As the Appellee was escorted away from his open car door Officer McTavish observed, in open view, what he believed to be prescription pills sitting on the driver's seat of the car, one of which he "was certain was Oxycodone." Further search of the vehicle revealed additional pills, an empty prescription pill container and a marijuana cigar also known as a "blunt."

Standard of Review

Our review of a trial court's ruling on a motion to suppress evidence involves a mixed question of law and fact. We accord a presumption of correctness with regard to the trial court's determination of facts where the trial court's factual findings are supported by competent, substantial evidence. All evidence and reasonable inferences therefrom must be construed in a manner most favorable to upholding the trial court's ruling. However, we review the trial court's application of the law to those facts de novo. *Ornelas v. United States,* 517 U.S. 690, 699, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996); *Connor v. State,* 803 So.2d 598 (Fla.2001); *T.T.N. v. State*, 40 So.3d 897 (Fla. 2 DCA 2010); *State v. Pruitt*, 967So.2d 1021 (Fla. 2nd DCA 2007).

Issues Presented

The trial court suppressed the seizure of contraband found during a search of the Appellee's vehicle. The Appellee argued before the trial court and argues now that the facts of this case are similar to those of *Arizona v. Gant,* 129 S.Ct. 1710 (2009). He advocates that because officers arrested him at the scene "only" for DWLSR the search of his vehicle is unlawful. The state argues that the officers had probable cause to arrest the Appellee for DUI as well as DWLSR at the scene and had probable cause to believe that the Appellee's vehicle contained evidence of the cause of the Appellee's impairment. The state further argues the fact that the Appellee was not officially charged with DUI until the urine sample was taken is not relevant. Additionally, the state argues that the contraband seized in this case was observed by the officers in "plain view" and was therefore lawfully seized. Although the state raised the issue of the "plain view doctrine" at hearing before the trial court, the trial court failed to rule on this issue electing to reserve its "findings of fact" for its final order. The trial court granted the Appellee's Motion to Suppress. However, in its final order the trial court did not address the "plain view doctrine" at all. We have jurisdiction. *See* Fla. R. App. P. 9.140(c)(1)(B).

I. *Plain View Doctrine / Open View Doctrine*

We find that of the two legal principals raised by the state at hearing and in its appellate brief the question of whether the plain view doctrine applies is most applicable to the issues stated in this case and is dispositive.

In his brief, the Appellee chose not to respond to the state's suggestion that the plain view doctrine was applicable to this case. Appellee's brief focuses solely on the

facts as they relate to Supreme Court's holding in *Arizona v. Gant,* 129 S.Ct. 1710 (2009). We do not believe the dictates of *Gant*, are controlling in this case. Nor do we believe the holding in *Gant,* has, in any way, modified the settled law relating to searches and seizures premised upon the "plain view doctrine" or, more appropriately in this case, the "open view doctrine."

In its brief the state cites to *Pagan v. State,* 830 So.2d 792 (Fla. 2002). In *Pagan,* officers were inside the defendant's residence pursuant to a search warrant and observed in plain view evidence of jewelry taken in a previously reported burglary. *Id.* at 809. In this case officers did not have authorization to enter the Appellee's vehicle before they observed the contraband and then retrieved it which is a prerequisite of the plain view doctrine. *See Ensor v. State,* 403 So.2d 349 (Fla. 1981). The Appellee highlighted this fact at hearing. He argued:

> MR. LOUDERBACK: The court goes on to say, quoting from other cases, 'What the 'plain view' cases [have] in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused.' And further down in the next full paragraph the court indicates, 'Justice Stewart described the two limitations on the doctrine that he found implicit in its rationale: First, that plain view alone is never enough to justify the warrantless seizure of evidence, and second, that the discovery of evidence in plain view must be inadvertent.' The plain view doctrine does not give the police the authority in and of itself to go and do a search and then bootstrap it by saying, well, it was right out there in plain view. (Hearing transcript at 18)

The state has confused the appropriate doctrine that is to be applied under the instant factual circumstances. In *Ensor v. State,* 403 So.2d 349 the supreme court clarified the circumstances under which the "plain view doctrine" is to be applied. It is not applicable in this case. Under the factual scenario presented here the applicable doctrine is the

"open view doctrine." The court in *Ensor,* went to lengths to explain that there is a distinction. We highlight the distinction below.

a. *Plain View – Prior Valid Intrusion*

The plain view doctrine relates only to circumstances where the police are lawfully engaged in the search of a constitutionally protected area usually as the result of a search warrant or some exception to the warrant requirement and inadvertently discover contraband. The court in *Ensor* explained it thusly:

> The 'plain view doctrine,' as described in *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) refers exclusively to the legal justification the reasonableness for the seizure of evidence which has not been particularly described in a warrant and which is inadvertently spotted in the course of a constitutional search already in progress or in the course of an otherwise justifiable intrusion into a constitutionally protected area. It has no applicability when the vantage point from which the "plain view" is made is not within a constitutionally protected area.

In other words, "[u]nder the plain view doctrine, 'if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object itself, they may seize it, without a warrant.'" *Jones v. State* 648 So.2d 669, 677 (Fla. 1994) (citations omitted). If police view the contraband from a vantage point not within the constitutionally protected area then the "plain view doctrine" is not applicable.

> What the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification-whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused-and permits the warrantless seizure.

Coolidge v. New Hampshire, 403 U.S. 443, 466, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971)

b. *Open View Doctrine*

If the police are not already legitimately within a constitutionally protected area when they observe contraband but instead view the contraband from a vantage point that any citizen has the right to occupy then the plain view doctrine is not at play and the "open view doctrine" must become a part of the analysis. There are "[t]wo factual scenarios [that] fall into the category of 'open view.'" *Ensor v. State,* 403 So.2d 349 (Fla. 1981).

1. *Non-Intrusion (No Intrusion).* "Non-intrusion" occurs "when both the officer and the contraband are in a non-constitutionally protected area. Because no protected area is involved, the resulting seizure has no fourth amendment ramifications, and, while the contraband could be defined as in 'plain view,' it should not be so labeled to prevent any confusion with the *Coolidge* 'plain view doctrine.'" *Ensor v. State,* 403 So.2d at 352. *See e.g., State v. Jacoby,* 907 So.2d 676 (Fla. 2 DCA 2005) (contraband strewn about at an accident scene where defendant had no reasonable expectation of privacy was properly seized as it was in open view and was not constitutionally protected).

2. *Pre-Intrusion.* The "pre-intrusion" cases are commonly linked to automobile searches where the officer was able to observe contraband inside a vehicle during lawful police contact. "Here, the officer is located outside of a constitutionally protected area and is looking inside that area. If the officer observes contraband in this situation, it only furnishes him probable cause to seize the item. He must either obtain a warrant or have some exception to the warrant requirement before he may enter the protected area and seize the contraband." *Ensor v. State,* 403 So.2d at 352. *See e.g., State*

v. Fischer, 987 So.2d 708 (Fla. 5 DCA 2008) (officers properly seized contraband after they observed cocaine in the driver's seat of the defendant's vehicle after the defendant was asked to step out of the vehicle). At bar the factual scenario is appropriately subject to the "open view" "pre-intrusion" analysis.

"Open View" Probable Cause Requirement

In its brief the states argues "regardless of the actions of Officers (sic) surrounding the arrest for DWLSR, Officer McTavish had established probable cause to arrest the Appellee for DUI." (Brief of Appellant at 8-9). As the supreme court noted in *Ensor, supra* at 352, when contraband is observed in open view probable cause is still required in order to seize the item if the item is observed while the item is in a constitutionally protected area. *See also, State v. Jacoby*, 907 So.2d 676, 680 (Fla. 2d DCA 2005) (items were properly seized when the officer saw them in open view and "had probable cause to associate the property with criminal activity") *review dismissed,* 918 So.2d 292 (Fla. 2005).

> [W]arrantless seizures of personal property are generally considered unreasonable for Fourth Amendment purposes unless there is probable cause to believe the property is or contains contraband or evidence of a crime and the seizure falls within an established exception to the warrant requirement. . . . Because privacy rights are not implicated, the seizure of property in open view is presumptively reasonable, assuming there is probable cause to associate the property with criminal activity.

Jones v. State, 648 So.2d 669, 676 (Fla. 1994). In determining whether there is probable cause to believe that a crime has been or is being committed an officer is entitled to take into consideration the totality of the circumstances including his training and experience.[1]

[1] It is not possible to articulate precisely what the "probable cause" is. *Orleans v. U.S.,* 517 U.S. 690, 695, 116 S.Ct. 1657 (1996). [It is a] "commonsense, nontechnical conception[] ... that deals with 'the factual practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. ... [P]robable cause to search . . . exist[s] where the known facts and circumstances are sufficient to warrant a

Absolute certainty that certain items are contraband is not required if the surrounding circumstances lead a reasonable officer to believe that what she has observed in "open view" is evidence of criminal activity. In *State v. Fischer,* 987 So.2d 708, 712 (Fla. 5th DCA 2008) (emphasis added) the Fifth District stated:

> In order to establish probable cause, '[a] police officer does not have to 'know' that a certain item is contraband.' *State v. Hafer*, 773 So.2d 1223, 1225 (Fla. 4th DCA 2000); *see also State v. Walker*, 729 So.2d 463, 464 (Fla. 2d DCA 1999) ('In determining whether the incriminating nature of the evidence is immediately apparent, police are not required to know that an item is contraband.' (*quoting State v. Futch*, 715 So.2d 992, 993 (Fla. 2d DCA 1998))). Rather, it is enough that 'the facts available to the officer would lead a reasonable man of caution to believe that certain items may be contraband.' *Walker*, 729 So.2d at 464 (citing *Futch*, 715 So.2d at 993). These facts may include not only the appearance of the suspected contraband, *but also all of the surrounding circumstances.*

At bar, the officers arrive on the scene they are made aware that the Appellee had been sitting in his car for twenty minutes unconscious. Upon making contact with him both officers concur that the Appellee exhibited the classic signs of impairment and was "basically out of it." Officer McTavish believed the Appellee to be under the influence of something other than alcohol as he was not able to detect the odor of alcohol on his breath. As Appellee steps from the vehicle he appeared unsteady on his feet. Officer McTavish was able to observe, in open view from outside the car, several pills sitting on Appellee's driver's seat. Officer McTavish, an officer who has 26 years of experience, a former member of the DUI squad, with 70 DUI arrest, a former vice and narcotics officer and who is certified in "advance narcotics investigations and tactics," observes what he is certain is oxycodone. Considering the facts of this case, under the totality of the

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man of reasonable prudence in the belief that contraband or evidence of a crime will be found." *Id.* at 695-696.

circumstances police had probable cause to search Appellee's vehicle upon seeing oxycodone in open view.

"Open View" Automobile Exception

"Pursuant to *Pennsylvania v. Labron,* 518 U.S. 938, 940, 116 S.Ct. 2485, 135 L.Ed.2d 1031 (1996), if a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment permits police to search the vehicle without more." *State v. Green,* 943 So.2d 1004, 1006 (Fla. 2d DCA 2006). The state need not show exigent circumstances.[2] Generally, when there is a pre-intrusion open view observation of contraband and that contraband is located within an automobile nothing more is required to justify a search and seizure as long as there is probable cause to believe that a crime has been or is being committed. *See Fisher v. State,* 987 So.2d 708 (Fla. 5th DCA 2008) (police officers had probable cause to believe that powdery substance they saw on seat inside defendant's vehicle was cocaine, and thus officers were justified in seizing it under open view doctrine without first obtaining a warrant); *State v. Green*, 943 So.2d 1004, 1006-07 (Fla. 2d DCA 2006) ("[o]nce probable cause is established, the officers may search the vehicle. The warrantless search of Mr. Green's

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[2] *See State v. Green,* 943 So.2d 1004, 1006 (Fla. 2d DCA 2006).

> We note there are some cases that might imply, contrary to the holding in [*Michigan v.*] *Thomas,* that the automobile exception applies only when exigent circumstances exist to excuse the application for a warrant. *See, e.g., Jaimes v. State,* 862 So.2d 833, 836 (Fla. 2d DCA 2003) (emphasis added) (citations omitted) (stating, "Absent a search warrant, there are three valid means by which law enforcement may search a vehicle: (1) incident to a valid arrest of a recent occupant of the vehicle; (2) under the 'automobile exception' to the warrant requirement, *which requires exigent circumstances coupled with probable cause;* and (3) when a vehicle has been impounded, as part of a reasonable inventory search following standardized procedure"); *see also Union v. State,* 660 So.2d 803 (Fla. 2d DCA 1995); *Walker v. State,* 636 So.2d 583 (Fla. 2d DCA 1994). These cases, however, involve searches performed incident to an arrest or without probable cause-not searches in which there was evidence of a crime inside the vehicle in plain view. Given the Supreme Court's unequivocal holding in *Thomas,* 458 U.S. 259, 102 S.Ct. 3079, 73 L.Ed.2d 750, no exigent circumstances are required in order to apply the automobile exception to the warrant requirement.

car was thus authorized once the officer saw the razor blade and white powdery residue through the window") (footnote omitted); *State v. Daniel*, 622 So.2d 1344, 1345 (Fla. 3d DCA 1993) ("where a moving vehicle is stopped on the public street by police and immobilized, as here, the law is well settled that the police need not obtain a search warrant to search the vehicle so long as there is probable cause for the search."); *State v. Starkey*, 559 So.2d 335, 339 (Fla. 1st DCA 1990) ("[w]e understand from the holding in [*California v.*] *Carney* [,] [471 U.S. 386, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985),] that the police are now free to search any vehicle, any time, and any place (except when it is on residential property) simply because the police have probable cause to believe that the vehicle contains contraband or other evidence of a crime. It is our understanding that the *Carney* holding has eliminated any Fourth Amendment requirement for a warrant or showing of exigent circumstances."); *State v. Coleman*, 502 So.2d 13 (Fla. 4 DCA 1986) (officers observed contraband in the defendant's car after he had exited the car and was secure in his residence. "Considering the totality of the circumstances, the officers reasonably concluded that the defendant's vehicle contained marijuana. The drugs, under these circumstances, could then be lawfully seized without a warrant").

The prerequisites to the search and seizure of contraband located within the Appellee's vehicle pursuant to the open view doctrine have been met in this case. The prescription medication and the marijuana "blunt" were properly seized.

II. *Search Incident to Lawful Arrest - Arizona v. Gant*

In his brief Appellee posits "[t]he record of the Motion to Suppress hearing bears out that Appellee was being arrested only for the offense of Driving While License Suspended or Revoked." (emphasis in original). The argument is that the offense of

Driving While License Suspended or Revoked does not support any belief that contraband related to that offense can be found in the vehicle. Thus Appellee argues that the search of his vehicle was not a valid search incident to a lawful arrest. If the facts of this case ended with only Appellee's arrest for DWLSR the holding in *Gant,* 129 S.Ct. 1710, would end the inquiry and we would affirm the trial court. However, here there is more. At hearing the Appellee stressed that he was not "arrested" for Driving Under the Influence until several hours after he was taken into custody. In his reply brief Appellee chose not to address the issue of the DUI at all. Nor did he respond to the state's argument that there was "probable cause" for a DUI arrest precipitating the search.

The facts are not in dispute that upon making contact with the Appellee as he sat in the vehicle the officers observed signs of impairment that included slurred speech, incoherence and dilated pupils. He was "out of it" Officer McTavish testified. The officers determined that Appellee's license was suspended and he was asked to step out of the vehicle. As Appellee stepped out of the car he staggered and was unsteady on his feet. Prior to discovering Appellee did not have a valid license Officer McTavish felt he had "reasonable suspicion" to believe that the Appellee was operating his vehicle while he was under the influence. In the mind of Officer McTavish the Appellee was in custody for more than DWLSR. At hearing during cross examination Officer McTavish is asked the following:

Q. All right. Now, based upon your knowledge of the case, at the time that Mr. Francis was removed from the scene --

A. Yes, sir.

Q. -- would it be a correct statement that the only thing that he was in custody

for at that point was driving on a suspended license with knowledge?

A. No, sir.

(Hearing Transcript at 22).

Officers have statutory procedures that they must follow relating to DUI. Police have no authority to require a person to submit to DUI testing unless that person is under lawful arrest.[3] *See* Florida Statute 316.1932. *See also, DHSMV v. Pelham,* 979 So.2d 304, 305-306 (Fla. 5th DCA 2008) (police can only order breath or blood test if the defendant is lawfully arrested. "Thus a lawful arrest must precede the administration of a breath test"); *DHSMV v. Whitley,* 846 So.2d 1163 (Fla. 5th DCA 2003) (a breath "test must be incidental to a lawful arrest"). At the scene the officers never advised the Appellee he was under arrest for DUI. The officer testified that Appellee was not under arrest at the scene for DUI. Neither fact is dispositive of the issue. *In Mathis v. Coats,* 24 So.3d 1284, 1286 (Fla. 2 DCA 2010) the defendant was detained for erratic driving and suspected of driving under the influence. The defendant had bloodshot eyes, slow coordination and a flushed face. *Id.* at 1286. The defendant was cooperative and did not smell of alcohol. *Id.* The defendant was asked to submit to field sobriety test which she was not able to satisfactorily complete. *Id.* The defendant was handcuffed and taken to central breath testing (hereinafter CBT) and asked to resubmit to field sobriety test and a

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[3] Florida Statute 316.1932 (2009) (emphasis added) states, in pertinent part:

Any person who accepts the privilege extended by the laws of this state of operating a motor vehicle within this state is, by so operating such vehicle, deemed to have given his or her consent to submit to an approved chemical test or physical test including, but not limited to, an infrared light test of his or her breath for the purpose of determining the alcoholic content of his or her blood or breath if the person is *lawfully arrested for any offense allegedly committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic beverages. The chemical or physical breath test must be incidental to a lawful arrest* and administered at the request of a law enforcement officer who has reasonable cause to believe such person was driving or was in actual physical control of the motor vehicle within this state while under the influence of alcoholic beverages.

breath test. *Id.* at 1287. The breath test revealed no positive results and a urine sample was taken. *Id.* The defendant was then given a DUI citation. *Id.* In her suit against the Pinellas County Sherriff's Office she argued that she was not under arrest until sometime after she arrived at the CBT. *Id.* She also argued that before being taken to CBT she was not told that she was under arrest. *Id.* The trial court found that she was under arrest when she was placed in the cruiser at the scene of the stop. *Id.* The appellate court upheld the trial court's ruling. *Id.* The appellate court found that detaining the defendant, requiring her to submit to field sobriety test, handcuffing her, placing her in the back of a police cruiser and transporting her to CBT is not a "mere detention." *Id.* "The trial court correctly concluded that Ms. Mathis was under arrest at the scene of the traffic stop." *Id. See also, State v. Rivas-Marmol,* 679 So.2d 808, 809 (Fla. 3d DCA 1996) (arrest of defendant accused of DUI occurred after he failed a field sobriety test and was handcuffed, placed in the back of a police cruiser, and advised he was going to the police station); *Saturnino-Boudet v. State,* 682 So.2d 188, 193 (Fla. 3d DCA 1996), *review dismissed,* 689 So.2d 1071 (Fla.1997) ("[w]here ... the detained individual is physically removed from the scene and involuntarily transported to the police station for questioning and/or investigation, the courts have had little difficulty in construing such a detention to be a de facto arrest ..."); *Griggs v. State,* 994 So.2d 1198, 1199 (Fla. 5th DCA 2008) (accused who was handcuffed, told he was being detained following a traffic stop, placed in a cruiser and taken to a police building was under arrest even though officers never used the word "arrest.")

This court finds that the Appellee was under arrest for the purpose of DUI at the time he was placed in the back of the police cruiser and transported to central breath

testing even if those words were never used by the officer. As such the officer's search of the vehicle after having probable cause to believe that the Appellee was driving under the influence and after observing oxycodone on the driver's seat was at once an "open view" search and a search incident to a lawful arrest. The search does not run afoul of the holding in *Arizona v. Gant,* 129 S.Ct. 1710 (2009)[4].

IT IS THEREFORE ORDERED that the order of the trial court granting Appellee's Motion to Suppress is reversed.

ORDERED at Clearwater, Florida this 16th day of December, 2010.

Original order entered on December 16, 2010 by Circuit Judges Michael F. Andrews, Raymond O. Gross, and R. Timothy Peters.

cc: Honorable James V. Pierce
Frank Louderback, Esquire
Office of the State Attorney

[4] Police may search a vehicle incident to a recent occupant's arrest "only if the arrestee is within reaching distance of the passenger compartment at the time of the search *or it is reasonable to believe the vehicle contains evidence of the offense of the arrest."* *Arizona v. Gant,* 129 S.Ct. 1710, 1723 (2009) (emphasis added).