DRIVEN

to successfully prosecute DUI cases in Mississippi

Volume 6, Issue 1 **Summer, 2010**

There is a new drug being abused across the country—K2. K2 contains a chemical substance with a similar structural makeup of THC, the drug found in marijuana.

While banned in most of Europe, K2 is sold legally in the United States, marketed as "incense." K2 is smoked in a similar fashion to marijuana and has effects similar to or stronger than THC.

Experts are worried about the dangers associated with this new unknown drug. "You have these products that were not meant for human consumption that are being used for human consumption because they reportedly have effects similar to THC," said Will Taylor, public information officer for the Chicago office of the Drug Enforcement Administration." [1]

One expert, Anthony Scalzo, M.D., a professor of toxicology at Saint Louis University, has seen nearly 30 cases involving teenagers who were experiencing hallucinations, severe agitation, elevated heart rate and blood pressure, vomiting, and in some cases, tremors and seizures after using K2. [2]

Other concerns with the drug include the future side effects that might develop from its use and regulating the manufacturing of a drug which is produced mostly overseas.

Furthermore, because K2 is not tested by current drug tests, it has been rumored to be abused by probationers, parolees and athletes.

Picture of K2 packaged for sale.

Whether K2 remains legal or becomes illegal in the future, as for now, in the eyes of the law in Mississippi, one thing is clear— "It is unlawful for any person to drive or otherwise operate a vehicle within this state who…is under the influence of any other substance which has ***impaired*** such person's ability to operate a motor vehicle…." Miss. Code Ann. § 63-11-30(1)(b).

1 Swartz, Tracy "K2 herbal product in demand, despite warnings" Chicago Tribune 20 April 2010. http://mobile.chicagotribune.com

2 Toxicologist Warning to Parents: Look for Signs of K2 http://ww.slu.edux35328.xml

Table of Contents

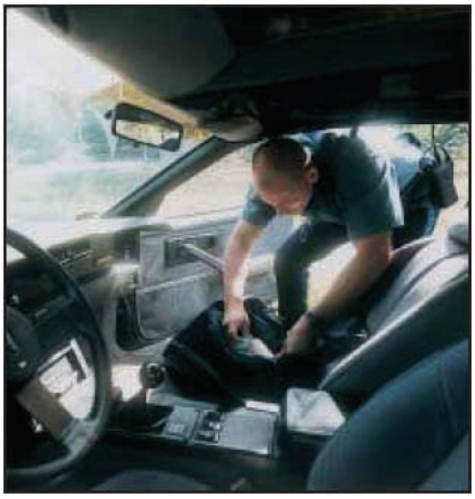
GET THE KEYS: HOW YOU CAN INTERVENE

Here are some helpful tips from the National Highway Traffic Safety Administration (NHTSA) on how to get the keys away from a drunk driver:

1) **If it is a close friend, try and use a soft, calm approach at first. Suggest to them that they've had too much to drink and it would be better if someone else drove or if they took a cab.**
2) **Be calm. Joke about it. Make light of it.**
3) **Try to make it sound like you are doing them a favor.**
4) **If it is somebody you don't know well, speak to their friends and have them make an attempt to persuade them to hand over the keys. Usually they will listen.**
5) **If it's a good friend, spouse, or significant other, tell them that if they insist on driving, you are not going with them. Suggest that you will call someone else for a ride, take a cab, or walk.**
6) **Locate their keys while they are preoccupied and take them away. Most likely, they will think they've lost them and will be forced to find another mode of transportation.**
7) **If possible, avoid embarrassing the person or being confrontational, particularly when dealing with men. This makes them appear vulnerable to alcohol and its effects.**

THE IMPACT OF ARIZONA V. GANT: LIMITING THE SCOPE OF VEHICLE SEARCHES?

By Mark M. Neil, Senior Attorney, National Traffic Law Center



The scope of a police officer's search of an automobile incident to the arrest of an occupant has been somewhat limited by a recent U.S. Supreme Court decision. The Court held in *Arizona v. Gant*,[1] that the search incident to arrest exception to the warrant requirement did not apply to the facts of this case and held that a vehicle search is not authorized incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle.

While investigating Gant for alleged drug activity, Tucson police officers learned Gant's driver's license had been suspended and there was an outstanding warrant for his arrest for driving with a suspended license. Officers observed Gant drive by, park and then get out of his automobile and shut the door. While about 30 feet apart, one officer called to Gant and they approached each other meeting 10 to 12 feet from Gant's car. Gant was then arrested and handcuffed.

Incident to his arrest, the officers then searched Gant's car, one finding a gun and the other a bag of cocaine in the pocket of a jacket on the backseat.

Because Gant was handcuffed and could not access the interior of the car to retrieve weapons or evidence at the time of the search, the Court found that the search incident to arrest exception did not justify the search in this case.

A divided Court (4-1-4) held (Stevens, J.) generally that a vehicle search incident to a recent occupant's arrest is not authorized after the arrestee has been secured and cannot access the passenger compartment of the vehicle. This is seemingly contrary to prior opinions in *Thornton v. United States*[2] and *New York v. Belton*[3]. Applying the safety and evidentiary justifications underlying *Chimel v. United States*[4] to limit *Belton*, much of what has been taught to and practiced by law enforcement officers regarding search incident to arrest is no longer valid. Gone is the more open and generous license to law enforcement officers in their ability to search the passenger compartment of a vehicle or any containers therein simply because they have arrested an occupant or recent occupant of the vehicle.

Yet, the opinion notes that *Gant* is consistent with the holding in *Thornton* and follows the suggestion of Justice Scalia's concurring opinion therein.[5] *Thornton* had expanded *Belton* to allow for searches of the passenger compartment of a vehicle that is contemporaneous incident of arrest even when the officer did not make contact until that person had left the vehicle. The rationale of allowing a search of the entire passenger compartment, regardless of the manner of contact of the arrestee, was in the search for a clear rule. Still, it is one based on ensuring officer safety and preserving evidence. Justice Scalia's concurring opinion in *Thornton* argued that if *Belton* searches were justifiable, it was because of the safety and evidentiary issues, not simply because the vehicle might contain evidence relevant to the crime for which he was arrested.

not only is an officer permitted to "conduct a vehicle search when an arrestee is within reaching distance of the vehicle," but also if "*it is reasonable to believe the vehicle contains evidence of the offence…*"

While at the same time limiting an officer's ability to search the vehicle incident to arrest based upon proximity and access for the purposes of officer safety and evidentiary safekeeping, the Court also indicated that there may be circumstances unique to the automobile context to justify a search incident to arrest when it is reasonable to believe evidence of the offense of arrest might be found in the vehicle.

The Court stated that not only is an officer permitted to "conduct a vehicle search when an arrestee is within reaching distance of the vehicle," but also if "*it is reasonable to believe the vehicle contains evidence of the offense or warrant*." (emphasis added). This allows for searches incident to arrest where the vehicle is outside of the arrestee's reach based upon reasonable belief rather than probable cause. Assuming that the defendant had been stopped and subsequently arrested for Driving Under the Influence of Alcohol (DUI), the officer would be justified in searching for evidence of the consumption of alcohol if he or she had a "reasonable" belief such evidence might be found. A search might also be permitted in the case of arresting the occupant of vehicle on an outstanding warrant so long as the officer had reasonable belief that evidence of the crime charged in the warrant might be found in the vehicle.

Going on, the Court lists certain exceptions that still apply and are available to officers.

- ***Frisk for Weapons***. Permitting officers to search a vehicle's passenger compartment when there is reasonable suspicion that an individual, whether or not the arrestee, is dangerous and might access the vehicle to gain immediate control of weapons.[6] This flows from the rationale for frisking a suspect for weapons.[7]
- ***Probable Cause of Evidence of Crime***. Where there is probable cause to believe a vehicle contains evidence of criminal activity.[8] Of particular interest is the mention that this allows for searches for evidence relevant to offenses other than the offense of arrest, and the scope of the search authorized is broader. This exception does not rely upon an arrest for justification.
- ***Protective Sweep***. Where safety or evidentiary interests would justify a search, such as a limited protective sweep of those areas in which an officer reasonably suspects a dangerous person may be hiding.[9] From a vehicle perspective, this exception may be applicable when dealing with larger vehicles such as multi-passenger vans, recreational vehicles, motor homes, buses and the like. Although not mentioned in the opinion, other exceptions should also still apply.
- ***Consent***. The easiest of all exceptions to the search warrant requirement is the one of consent. When the defendant makes a knowing and intelligent waiver of his

rights, the officer may search without a warrant.[10] This consent, however, may be limited in scope.[11]

● ***Inventory***. So long as the officer's department has a written policy providing for it, the officer may inventory the contents of a vehicle prior to it being impounded and towed for the purpose of safekeeping and avoiding claims of loss.[12]

● ***Plain View***. In situations where the officer is in a position in which he is lawfully entitled to be, anything plainly visible to him or her as being evidential or contraband falls under this well-established exception.[13]

● ***Abandonment***. If the vehicle has been abandoned, then the privacy interests normally protected by the 4th Amendment have also been abandoned and the officer is free to search the vehicle.[14]

● ***Sobriety Checkpoints***. Police may still conduct appropriate sobriety checkpoints to detect impaired drivers but not for general criminal activity.[15]

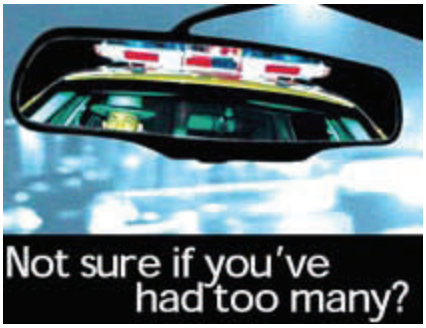
● ***Exigent Circumstances***. There may be circumstances that arise to the level permitting a search under this exception, but caution should always be used in relying upon it. Only in the direst of circumstances such as hot pursuit, imminent destruction of evidence or danger to a third person might this be applicable.[16]

Some activities do not arise to the level of a search and officers should not worry about this case having changed how they handle these situations. For example, dog sniffs of vehicles during an otherwise lawful stop are not affected. The dog sniff itself is not a search and as long as it is done during the pendency of a lawful stop and not beyond, there is no issue.[17] It would also be appropriate to note that quite often vehicles are part of a crime scene, such as in vehicular homicide or DUI with Death cases. Care should be taken to remember that there is no crime scene exception for search warrants.[18] Reliance purely upon the motor vehicle exception may not be workable when the vehicle is no longer mobile because of the crash. Some evidence within the vehicle, such as crash data recorders or some physical evidence might be subject to the exigent circumstances exception if the officer has a reasonable belief that the evidence may otherwise be lost. Officers are allowed to secure a crime scene pending the issuance of a search warrant.[19]

In short, the holding in *Arizona v. Gant* is not an overly burdensome one on law enforcement. While it certainly limits the prior practices of officers conducting wide ranging searches incident to an arrest of an occupant of a motor vehicle, it does still permit those searches under more defined circumstances. Perhaps the most important thing to come out of this case is the need for officers to articulate, and prosecutors to elicit, with great care and detail, the basis for the search.

Endnotes

1 *556 U.S. ___ , No. 07-542 (2009).*
2 *541 U.S. 615 (2004).*
3 *453 U.S. 454 (1981).*
4 *395 U.S. 752 (1969).*
5 Id. 541 U.S. at 632.
6 *Michigan v. Long, 463 U.S. 1032 (1983).*
7 *Terry v. Ohio, 392 U.S. 1 (1968).*
8 *United States v Ross, 456 U.S. 798 (1982).*
9 *Maryland v. Buie, 494 U.S. 325 (1990).*
10 *Schneckloth v. Bustamonte, 412 U. S. 218 (1973).*
11 *Florida v. Jimeno, 500 U.S. 248 (1991).*
12 *South Dakota v. Opperman, 428 U.S. 364 (1976).*
13 *Coolidge v. New Hampshire, 403 U.S. 443 (1971).*
14 *California v. Greenwald, 486 U.S. 35 (1988).*
15 *Michigan Dept. of State Police v. Sitz, 469 U.S. 444 (1990), Indianapolis v. Edmund, 531 U.S. 32 (2000).*
16 *Welsh v. Wisconsin, 466 U.S. 740 (1984), Schmerber v. California, 384 U.S. 757 (1966).*
17 *Illinois v. Caballes, 543 U.S. 405 (2005).*
18 *Mincey v. Arizona, 437 U.S. 385 (1978), Flippo v. West Virginia, 528 U.S. 11 (1999).*
19 *Thompson v. Louisiana, 469 U. S. 17 (1984).*



Caselaw Update

Knight v. State

No. 2008-KM-00498-COA
(Miss. Ct. App. July 28, 2009)

FACTS:

Knight, was convicted of DUI 1st, reckless driving and possession of beer in a dry county. Knight's car was stopped after a deputy witnessed Knight's vehicle running a stop sign and "jumping Highway 494" with all four wheels leaving the ground.

The deputy detected the smell of an alcoholic beverage coming from the vehicle and noticed a twenty-pack of beer, with approximately six or seven cold, unopened cans left in the box. Knight was asked to step out of the vehicle; he was cooperative and did not stagger, stumble or have slurred speech. Knight admitted that the beer was his and he had consumed one or two beers earlier. The deputy did not administer any field sobriety tests, but did ask Knight to take a breathalyzer test at the scene. Knight refused. Knight was taken into custody and transported to the Sheriff's Department where he refused to take an intoxilyzer test. At trial, the deputy testified that Knight refused the test because Knight said he did not believe he would pass.

HELD:

The Court held that Knight's refusal to submit to a breath test is probative, relevant and admissible at trial. Such evidence goes to the totality of

the circumstances in proving a common law DUI.

The MS Supreme Court has consistently held "[i]n cases, where the defendant's blood[-] alcohol results are unavailable…, but there is sufficient evidence that the defendant operated a vehicle under circumstances indicating his ability to [operate] the vehicle was impaired by the consumption of alcohol [,]" common law DUI can be proven.

Accordingly, the Court held Knight's admission to having a couple of beers, the odor of an alcoholic beverage, Knight's reckless driving, and the refusal of a chemical test was substantial evidence to support a DUI conviction under Miss. Code Ann. § 63-11-30-(1)(a).

Deeds v. State

No. 2008-KA-00146-SCT
(Miss. Dec. 3, 2009)

FACTS:

Deeds was involved in a three car collision after his vehicle crossed the center line and hit a car head-on. When the responding officer arrived, Deeds was pinned behind the steering wheel in a semiconscious state. The officer noticed "a …strong smell of an intoxicating beverage" on Deeds' breath and a half gallon of whisky in the vehicle. Deeds was airlifted to a hospital where the arresting officer observed a nurse draw a blood sample from Deeds. The sample was taken to the police department where it was locked into an evidence refrigerator until it could be taken to the MS Crime Lab. Tests concluded that Deeds' blood alcohol concentration was .13%. The municipal court dismissed the charge of DUI 1st noting the City could not proceed because it could not prove its case. Deeds pled guilty to no proof of insurance. Three months later Deeds was indicted and later convicted for driving under the influence causing injury in Desoto County Circuit Court.

On appeal, Deeds argued he was subjected to double jeopardy and the results of the blood test were inadmissible. Deeds attacked the admissibility of the blood test on four grounds: (1) the State failed to establish the first link in the chain of custody when it failed to identify the individual who took his blood; (2) that the State failed to establish that the individual who took his blood was *qualified* to perform the procedure in accordance with Miss. Code Ann. § 63-11-9; (3) he was deprived of his 6th amendment right to confront the nurse who drew his blood; and (4) the drawing of blood without his consent amounted to an improper seizure in violation of his 4th amendment rights.

HELD:

The Court held that jeopardy had not attached, finding the judge's comments on the order relative to the DUI charge *did not contain any findings* of the court; rather, the court merely recorded the reasons that the prosecutor gave for not proceeding to trial on the DUI charge. Here, the judge heard no witnesses and received no evidence. The US Supreme Court has consistently adhered to the view that jeopardy does not attach until the defendant is "put to trial before the trier of the facts."

In addition, the Court rejected all of Deeds' arguments attacking the admissibility of the blood evidence. First, as to Deeds' chain of custody argument, the Court found that "Mississippi law had never required a proponent of evidence to produce every handler of evidence." Additionally, Deeds never substantively questioned the genuineness of the blood sample. Third, there was no violation to Deeds' 6th amendment right to confrontation because "[n]either the procedure used to draw Deeds' blood, nor the physical blood specimens were statements." Therefore, the nurse was not a witness against Deeds. The officer personally observed the nurse draw the blood and label the sample, and then he delivered the sample to the crime lab. Both the officer and crime lab technician testified at trial.

The Court found no unlawful search and seizure—-the officer's observation at the scene gave him probable cause to obtain a blood sample.

The Court also found that ***exigent circumstances*** existed which made obtaining a warrant difficult. These circumstances included not only the undisputed fact that alcohol rates begin to dissipate after drinking ceases, but also that the officer was involved in the investigation of a major crash involving serious injuries to multiple people. This included their transportation to nearby hospitals, as well as, the time that would have been required to obtain a warrant before traveling to the hospital to obtain the samples.

Evans v. State

No. 2007-CT-00443-SCT.
(Miss. Jan. 21, 2010.)

FACTS

Evans was pulled over after she failed to stop while emergency vehicles were cleaning debris off the road late one evening. The officer smelled an alcoholic beverage coming from the vehicle, noticed an open beer can on the console, and unopened beer cans in the back seat. Evans admitted to drinking four (4) beers earlier that evening while eating dinner with a friend. The officer administered a PBT, which detected the presence of alcohol. After waiting approximately an hour for a wrecker, Evans was taken to the station and administered a breath test. The results indicated that Evans had a BAC of .09. %. She was charged with a DUI 1st under Miss. Code Section 63-11-30(1)(c). During the trial, the state successfully moved to exclude Evans' expert witness who was to testify regarding the absorption of alcohol.

The MS Court of Appeals reversed

holding, "Evans was attempting to introduce evidence to prove her blood-alcohol content was below the legal limit at the time of the stop, rather than attempting to prove she was not intoxicated."

While, "[a] defendant cannot offer evidence regarding whether or not [they were] under the influence which would impair [their] ability to drive a vehicle" in a per se violation (blood results over .08% under Miss. Code Ann. § 63-11-30(1)(c)), a defendant can offer evidence as to what their BAC % was at the time they were driving.

HELD:

The MS Supreme Court agreed with the court of appeals to reverse and remand for a new trial. However, the Court found the court of appeals erred in determining the qualifications of Evans' expert witness, as it is the trial court's responsibility to rule if a witness should be qualified as an expert. The "trial judge is the gatekeeper who assesses the value of the testimony." It is his duty to determine whether or not a witness is qualified and whether the testimony is reliable and consistent with the standards set out in the Mississippi Rules of Evidence.

Fluker v. State

No. 2009-KM-00237-C
(Miss. Ct. App. Feb. 23, 2010)

FACTS:

Fluker was pulled over after an officer noticed Fluker's car traveling 62mph in a 55mph zone, driving two close to the center line, and having black tinted windows. During the stop, the officer detected a strong smell of an alcoholic beverage coming from the vehicle. At first, Fluker denied drinking; however, later he admitted to having 2-3 drinks about 30 minutes prior. Fluker was reasonably calm, a bit nervous, and he staggered a bit when asked to step to the rear of the vehicle. A portable breath test indicated he had been drinking. The officer asked Fluker his educational level and proceeded to have him recite the alphabet. Fluker was unable to recite the alphabet without singing it. Fluker was cited for DUI 1st and driving near the center line for more than 200 yards. Fluker refused a breath test.

HELD:

The Court held, "[t]he action of an officer stopping a vehicle is reasonable when there is probable cause to believe that a traffic violation has occurred." (citing *Walker v. State)*. Accordingly, the officer had probable cause to believe Fluker had committed "at leased two traffic violations…speeding and having overly tinted windows." Thus, the DUI was affirmed.

However, the Court found there was no proof that Fluker drove more than 200 yards in or near the center line of any highway. Reversed & rendered.

Harness v. State

No. 2007-CT-01415-SCT
(Miss. May 27, 2010.)

FACTS:

Harness was involved in a head-on collision. Empty beer cans were found at the scene and an unopened bottle of brandy in Harness' car. Harness admitted that he had been drinking, but denied being drunk. Both Harness and the other driver were taken to separate hospitals. The other driver subsequently died pursuant to his injuries sustained in the wreck. Harness' blood was drawn and sent to the crime lab. At the lab, the blood was tested twice, resulting in a BAC of .11%.

The lab sent the blood results to the prosecutor and advised that the blood sample would be destroyed within 6 months unless the lab was instructed to preserve it.

Harness filed a motion for discovery to receive the blood samples. After the State failed to comply with the first motion, Harness filed a motion to compel. Three weeks after the motion to compel, the District Attorney's office contacted the crime lab for the blood sample; however, it had been destroyed two weeks earlier (a week after the motion to compel). Harness moved to suppress the results of the blood analysis. The trial court overruled his motion and he was convicted of aggravated DUI. The court of appeals affirmed.

HELD:

The Court reversed and remanded for a new trial finding, "an unreasonable denial of a defendant's request for a blood test pursuant to Miss. Code Ann. § 63-11-13 amounts to a denial of due process of law."

Mississippi Code Ann. § 63-11-13 grants a statutory right when a "blood sample [is] taken from a person suspected of driving under the influence" to have the sample independently tested for BAC.

"Harness … was unreasonably denied his right to an independent blood test." While not intentional "the district attorney's indifference to the [D's] efforts to obtain independent testing…. is tantamount to a willful disregard of the affirmative duty to preserve evidence that might be expected to play a significant role in the suspect's defense."

Because the State failed to honor Harness's **timely** **request** and allowed the key evidence against him to be destroyed, he was unreasonably denied due process of law. Reversed and remanded for a new trial.

4th of July - Independence Day
Impaired Driving Prevention Campaign
June 20 - July 4, 2010

Drunk Driving is a Deadly Problem.

- Every 45 minutes and 32 times a day, someone in the United States dies in an alcohol impaired driving crash according to research by the U.S. Department of Transportation's National Highway Traffic Safety Administration.

Alcohol is a major factor in fatal crashes during the July 4th Holiday.

- In 2008, during the July 4th holiday period, there were a total of 491 traffic related fatalities. Out of that number, 43 percent involved a driver or motorcycle rider with a BAC of .08 or higher.
- In 2008, 37,261 people were killed in motor vehicle crashes. Out of that number, 11,773 people were killed in traffic crashes that involved at least one impaired driver or motorcycle rider with a blood alcohol concentration (BAC) of .08 or higher.

Plan a safe way home so you can be alive to enjoy the next celebration.

- Plan a safe way home before the festivities begin;
- Before drinking, please designate a sober driver and give that person your keys;
- If you're impaired, use a taxi, call a sober friend or family member, or use public transportation so you are sure to get home safely;
- If you happen to see an impaired driver on the road, don't hesitate to contact your local law enforcement.

Don't let this Fourth of July blow up in your face. Remember. *Drunk Driving. Over the Limit. Under Arrest.*

Jim Hood
Attorney General

Molly Miller
Special Assistant Attorney General
Traffic Safety Resource Prosecutor
550 High Street, Walter Sillers Bldg.
P.O. Box 220
Jackson, Mississippi 39205
E-Mail: mmill@ago.state.ms.us
Phone: 601.359.4265
Fax: 601.359.4254
www.ago.state.ms.us/divisions/prosecutors

July 13-15	Jackson PD SFST class
July 22-24	IACP (Drugs, Alcohol & Impaired Driving) Training
Aug. 3-5	Desoto County SFST class
Aug. 10-12	Starkville SFST class
Aug. 18–19	ARIDE (Advanced Roadside Impaired Driving Enforcement) training
Aug. 24-26	Tupelo SFST class
Sep. 13-15	Oxford CTS class
Oct. 6-8	Justice Court Judges Conf.
Nov. 9-11	STORM Conference

*SFST—Standardized Field Sobriety Testing

*CTS—Complete Traffic Stops