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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. LUIS ERNESTO ESTRADA, Defendant and Appellant.	B221094 (Los Angeles County Super. Ct. No. BA347251)

APPEAL from a judgment of the Superior Court of Los Angeles County. Edmund Willcox Clarke, Jr., and Drew E. Edwards, Judges. Affirmed.

Christopher A. Nalls, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., and Kamala D. Harris, Attorneys General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, Baine P. Kerr, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Luis Estrada appeals from the judgment entered following a jury trial in which he was convicted of possession of a firearm by a felon and carrying a loaded, unregistered firearm. Defendant contends the trial court erred by denying his motion to suppress the gun. We conclude that although the gun was seized in violation of the Fourth Amendment, it was nevertheless admissible under the good faith exception to the exclusionary rule. Accordingly, we affirm.

BACKGROUND

Defendant was arrested in Los Angeles on the night of September 23, 2008, after Los Angeles Police Department Officer Guillermo Calleros conducted a warrantless search of defendant's truck and found a loaded gun under the driver's seat floor mat. Defendant filed a motion to suppress the gun as the product of an unconstitutional search.

Calleros was the sole witness at the evidentiary hearing on defendant's suppression motion. Calleros testified that he and his partner were on patrol when he saw defendant leaning against the right rear passenger door of a pickup truck parked outside a bar. Another man was standing near defendant. Both of the doors on the passenger side of the truck were open. Calleros saw defendant drinking "tan" liquid from a large square bottle that "looked like one of those Costco bottles of Jack Daniels." Calleros explained that he was familiar with the style of bottle because he had previously purchased such big, square bottles of Jack Daniels. It thus appeared to Calleros that defendant was violating the law by drinking alcohol in public. As Calleros and his partner got out of their patrol car and approached the truck, defendant threw the bottle into the truck through the rear passenger door, closed both of the open truck doors, locked the truck, activated the truck's alarm, and put the keys "away on his person."

Calleros handcuffed defendant and put him "on the sidewalk." Calleros then asked defendant for the keys to the truck to "verify the container." Calleros opened the truck and found "a good-sized bottle of Jack Daniels" in the back seat. He smelled the contents of the bottle and found the aroma to be "exactly like Jack Daniels." After finding the bottle, Calleros "continued to look in the car to see if there was [*sic*] any other

alcoholic beverages and what not." He also explained that he continued to search because it was part of his practice and his job to "make sure there is no immediate threat, no weapons, any contraband . . . ." Calleros "made [his] way to the front driver's side compartment area, . . . noticed that the carpet was slightly—I don't know slightly canted up or like there was something underneath it, the mat, the floor mat." So Calleros lifted the mat and found the gun beneath it.

The trial court denied defendant's suppression motion, apparently on the theory that the gun was found in a search incident to defendant's arrest for drinking in public, although the court referred to "reasonable suspicion to detain" defendant.

After the United States Supreme Court decided *Arizona v. Gant* (2009) __ U.S. __ [129 S.Ct. 1710] (*Gant*) on April 21, 2009, defendant sought reconsideration of the denial of his suppression motion. The trial court ruled that *Gant* did not apply retroactively to the search of defendant's truck conducted in 2008.

At trial, Calleros testified that he saw defendant standing next to an open truck and drinking alcohol outside a bar, searched defendant's truck, and found a loaded gun under the floor mat. Calleros determined that the gun was registered to another person, who had reported it stolen. The parties stipulated that defendant had previously been convicted of a felony. At the police station, defendant told Calleros that he was the manager of the bar and had confiscated the gun from an intoxicated person in the bar. Defendant's sister testified that she owned the bar and defendant and his wife worked there for her. Defendant and his wife Ana both testified that on the night of September 23, 2008, a man who looked like a gang member and seemed to be intoxicated came into the bar. Ana saw a bulge at the man's waist and thought it was a pistol. She signaled defendant, who asked to see what the man had at his waist. The man said he had a gun and wanted a beer. Defendant told the man they could not serve him a beer unless he surrendered the gun. The man eventually handed his gun over to defendant, who took the gun outside to his pickup truck for safekeeping because there was no safe storage place for it inside the bar. The police arrived as defendant was walking back into the bar. Defendant admitted that

there was a bottle of whisky in his truck, but denied that he was drinking alcohol outside. Bar patron Giovany Marroquin Munoz testified that he was present in the bar on the night of September 23, 2008, and saw defendant take a gun from a patron and put it in a truck just before the police arrived.

The jury convicted defendant of possession of a firearm by a felon and carrying a loaded, unregistered firearm. Defendant admitted an allegation that he had a prior "strike" conviction. The trial court sentenced him to a second strike term of 32 months in prison.

DISCUSSION

Defendant contends that the trial court erred by denying his motion to suppress the gun because no exception to the search warrant requirement justified Calleros's entry into and search of defendant's truck. The Attorney General argues that the entry and search were valid as a search incident to defendant's arrest under *Gant, supra,* __ U.S. __ [129 S.Ct. 1710], but if the search was invalid, the evidence was nevertheless admissible under the good faith exception to the exclusionary rule because the search occurred before *Gant* was decided, and Calleros relied upon the existing authority at the time, *New York v. Belton* (1981) 453 U.S. 454 [101 S.Ct. 2860] (*Belton*).

The Fourth Amendment to the United States Constitution protects people from unreasonable government intrusions into their legitimate expectations of privacy. A warrantless search is presumed to be illegal. (*Mincey v. Arizona* (1978) 437 U.S. 385, 390 [98 S.Ct. 2408].) The prosecution always has the burden of justifying a warrantless search or seizure by proving that it fell within a recognized exception to the warrant requirement. (*People v. Williams* (1999) 20 Cal.4th 119, 130; *People v. James* (1977) 19 Cal.3d 99, 106.)

In ruling upon a motion to suppress, the trial court judges the credibility of the witnesses, resolves any conflicts in the testimony, weighs the evidence, and draws factual inferences. We will uphold the trial court's findings, express or implied, on such matters if they are supported by substantial evidence, but we independently review whether the

search or seizure was reasonable under the Fourth Amendment. (*People v. Alvarez* (1996) 14 Cal.4th 155, 182; *People v. Glaser* (1995) 11 Cal.4th 354, 362.)

a. *Belton* and *Gant*

"When officers have probable cause to believe that a person has committed a crime in their presence, the Fourth Amendment permits them to make an arrest, and to search the suspect in order to safeguard evidence and ensure their own safety." (*Virginia v. Moore* (2008) 553 U.S. 164, 178 [128 S.Ct. 1598].) This is true without regard to the nature of the offense and even if, under state or local law, the officers should have only cited the person instead. (*Id.* at pp. 173–178.) A lawful custodial arrest justifies a contemporaneous warrantless search of the person arrested and the area into which he or she might reach to retrieve a weapon or destroy or conceal evidence. (*Chimel v. California* (1969) 395 U.S. 752, 762–763 [89 S.Ct. 2034] (*Chimel*).)

From 1981 to 2009, Fourth Amendment jurisprudence included a "straightforward" and "workable rule" that permitted a law enforcement officer who was arresting an occupant or recent occupant of a vehicle to search the entire passenger compartment of the vehicle, including any containers and compartments therein. (*Belton, supra,* 453 U.S. at pp. 459–461 & fn. 4.) Although a footnote in *Belton* noted that the decision "in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests," and was instead merely intended to "determine the meaning of *Chimel*'s principles in this particular and problematic" context of arrest of an occupant or recent occupant of a vehicle (*Belton*, 453 U.S. at p. 460, fn. 3), *Belton* was "widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there was no possibility the arrestee could gain access to the vehicle at the time of the search." (*Gant*, *supra*, __ U.S. at p. __ [129 S.Ct. at p. 1718].)

In 2009, the United States Supreme Court decided *Gant*, *supra*, __ U.S. __ [129 S.Ct. 1710], which, in part, restricted searches of a vehicle incident to a custodial arrest to the justifications underlying *Chimel*, *supra*, 395 U.S. at page 763, but also established a

new ground for a warrantless investigatory search of a vehicle in conjunction with a custodial arrest: "[W]e reject this reading of *Belton* and hold that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search. [¶] Although it does not follow from *Chimel*, we also conclude that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" (*Gant, supra*, __ U.S. at p. __ [129 S.Ct. at p. 1719], fn. omitted.) The court noted, "In many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence. [Citations.] But in others, . . . the offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein." (*Ibid.*)

The police arrested Gant on an outstanding warrant for driving with a suspended license after he parked his car, got out, shut the car door and walked 10 to 12 feet toward an officer. Officers handcuffed Gant and put him in the back of a police car before searching his car. During the search of the car, officers found a gun and cocaine. (*Gant, supra*, __ U.S. at p. __ [129 S.Ct. at p. 1715].) The Supreme Court concluded, "Neither the possibility of access nor the likelihood of discovering offense-related evidence authorized the search in this case. Unlike in *Belton*, which involved a single officer confronted with four unsecured arrestees, the five officers in this case outnumbered the three arrestees, all of whom had been handcuffed and secured in separate patrol cars before the officers searched Gant's car. Under those circumstances, Gant clearly was not within reaching distance of his car at the time of the search. An evidentiary basis for the search was also lacking in this case. . . . Because police could not reasonably have believed either that Gant could have accessed his car at the time of the search or that evidence of the offense for which he was arrested might have been found therein, the search in this case was unreasonable." (*Gant, supra*, __ U.S. at p. __ [129 S.Ct. at

p. 1719].) Accordingly, the court upheld the Arizona Supreme Court's decision that the search violated the Fourth Amendment.

We agree with the parties that *Gant* applies retroactively. (*Griffith v. Kentucky* (1987) 479 U.S. 314, 328; *People v. Reyes* (1998) 19 Cal.4th 743, 755.)

b. Recent occupant of truck

Defendant argues that the search was not constitutionally permissible under *Gant* because he was not a recent occupant of the truck when the officers arrested him, in that the truck was parked and they did not see him physically inside it. In *People v. Stoffle* (1991) 1 Cal.App.4th 1671 (*Stoffle*), a police officer saw Stoffle and a friend standing at the rear of a car drinking beer from cans. Stoffle leaned through an open window into the car, which he later told the officer was his. The officer arrested Stoffle on outstanding traffic warrants and discovered cocaine when he looked into the car to satisfy Stoffle's request to retrieve his cigarettes. (*Id.* at pp. 1675–1676.) The Court of Appeal concluded that the search of the car was permissible as a search incident to a lawful custodial arrest because the evidence supported a conclusion that Stoffle was a recent occupant of the car. The court articulated the following standard to determine whether a person who was not actually sitting in the car when arrested was a recent occupant: "[T]here must be circumstances which show the person still had, at the moment of arrest, a close association with the car. Such circumstances exist, for example, where, as here, the arrestee has acknowledged he owns the car, has recently been physically in the car, and while staying close to the car continues to have access to it. In such a situation, the arrested person has such a close association with the car that he could just as easily grab a weapon or evidence as if police came upon him while he was sitting in the car." (*Id.* at pp. 1682–1683.) In *Thornton v. United States* (2004) 541 U.S. 615 [124 S.Ct. 2127] (*Thornton*), the United States Supreme Court held that a man who parked and exited his vehicle was a recent occupant of the vehicle for purposes of a search of the vehicle incident to the man's arrest. It noted that "while an arrestee's status as a 'recent occupant' may turn on his temporal or spatial relationship to the car at the time of the

arrest and search, it certainly does not turn on whether he was inside or outside the car at the moment that the officer first initiated contact with him." (*Id.* at p. 622, fn. omitted.)

The facts here are strikingly similar to those in *Stoffle, supra*, 1 Cal.App.4th 1671. The truck was parked outside a bar. The front and rear doors on the passenger side of the truck were open, and defendant was standing "against" the open rear passenger-side door. Defendant threw the liquor bottle through the rear door into the passenger compartment of the truck as Calleros approached. Defendant then closed both doors, locked the truck and activated its alarm with the remote control, and put the truck's keys away. Defendant was thus in physical close proximity to the truck and both had access to and actually accessed the interior compartment of the truck. Defendant's position next to the open doors of the truck afforded him at least as full an opportunity to grab a weapon or evidence from the inside of the truck as if he had been seated inside it. Although the record was not developed at the suppression hearing regarding whether defendant owned the truck, his access to and use of keys and the interior compartment established that he at least possessed the truck and was exercising dominion and control over it. (At trial, defendant referred to the truck as his.) Under the circumstances, it was unnecessary for the officers to see defendant drive or sit in the truck.

c. Probable cause to arrest

Next, defendant argues that the officers did not have probable cause to arrest him for drinking in public because they did not know what was in the bottle until after the search. Probable cause to arrest exists when the facts known to the arresting officer would lead a person of ordinary care and prudence to entertain an honest and strong suspicion that the person to be arrested is guilty of a crime. (*People v. Price* (1991) 1 Cal.4th 324, 410.) Probable cause may exist even though there is room for doubt or the facts known to the officer would not alone be sufficient to support a conviction. (*Hamilton v. City of San Diego* (1990) 217 Cal.App.3d 838, 844.)

Calleros testified at the suppression hearing that he saw defendant drinking "tan" liquid from a large square bottle that "looked like one of those Costco bottles of Jack

Daniels." Calleros explained that he was familiar with the style of bottle because he had previously purchased such big, square bottles of Jack Daniels. As Calleros and his partner got out of their patrol car and approached, defendant behaved suspiciously by throwing the bottle into the truck, closing the truck's doors, and locking the truck. Taken together, these facts were sufficient to lead a person of ordinary care and prudence to entertain an honest and strong suspicion that defendant had been drinking alcohol in public. Probable cause did not require Calleros to know with certainty that the bottle from which defendant had been drinking contained alcohol.

d. Scope of search

Defendant also argues that a general search of the entire passenger compartment of the truck was impermissible under *Gant, supra*, __ U.S. __ [129 S.Ct. 1710], because "Calleros's suspicion that the truck contained evidence of drinking in public did not justify a search of the *entire* truck, particularly after Calleros found the evidence he was looking for," and "it was not reasonable to believe that evidence of [defendant] drinking in public would be found under the driver's side floor mat." The Attorney General argues that it was permissible for Calleros to continue to search after finding the bottle and to look under the floor mat because "the reasonable basis to search did not expire, but allowed a full search of the passenger compartment and its containers for additional evidence that [defendant] was drinking in public." The parties thus implicitly agree that the search in issue cannot be deemed to have been based upon the *Chimel* justifications of preventing defendant, who was outside of the truck, handcuffed, and under the supervision of Calleros's partner, from retrieving a weapon or destroying or concealing evidence. Instead, the search was justified, if at all, by *Gant*'s expansion of *Belton* to permit a search "when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" (*Gant, supra*, __U.S. at p. __ [129 S.Ct. at p. 1719].)

Calleros testified at the suppression hearing that he "opened the truck, discovered the container that [defendant] tossed in there," which was "a good-sized bottle of Jack Daniels"—exactly the type of bottle from which Calleros believed defendant had been

drinking. But Calleros "continued to look in the car to see if there was [*sic*] any other alcoholic beverages *and what not*." (Italics added.) Calleros also explained that he continued to search the truck because it was part of his practice and his job to "make sure there is no immediate threat, no weapons, any contraband . . . ." But Calleros was not permitted by the *Gant* investigatory search exception to continue to search the truck for weapons, contraband, or "whatnot." Calleros had no probable cause to arrest defendant—and in fact did not initially arrest defendant—for possession of contraband or a weapon-related offense. If Calleros had originally arrested defendant for possession of a controlled substance or being a felon in possession of a firearm, a complete search of the truck's passenger compartment, including under the floor mats, would probably have been permissible because mere possession of such items is illegal. Accordingly, we conclude the scope of the search exceeded the authority that justified it, and the search that led to the seizure of the loaded gun violated the Fourth Amendment.

Our conclusion is consistent with the origin of the *Gant* investigatory search exception, which was Justice Scalia's concurring opinion in *Thornton, supra*, 541 U.S. at pages 629, 631, in which he asserted that the "honest" ground for a *Belton* search was that "the car might contain evidence relevant to the crime for which [the defendant] was arrested." Justice Scalia explained, "There is nothing irrational about broader police authority to search for evidence when and where the perpetrator of a crime is lawfully arrested. The fact of prior lawful arrest distinguishes the arrestee from society at large, and distinguishes a search for evidence of *his* crime from general rummaging." (*Id.* at p. 630.) To allow a search of a vehicle here would be to permit general rummaging.

e. Applicability of good faith exception to exclusionary rule

The Attorney General argues that the good faith exception to the application of the exclusionary rule should be applied here because the search occurred prior to the *Gant* decision, and the officers relied in good faith upon *Belton* in searching the truck. The same issue is currently pending in both the California Supreme Court in *People v.*

Branner (2009) 180 Cal.App.4th 308, review granted March 10, 2010, S179730, and *People v. Henry* (2010) 184 Cal.App.3d 1313, review granted May 25, 2010, S183964, and the United States Supreme Court in *United States v. Davis* (11th Cir. 2010) 598 F.3d 1259, certiorari granted November 1, 2010, No. 09-11328, __U.S. __ [131 S.Ct. 502].

Defendant argues that *Gant* clarified that the search Calleros conducted was not legal under *Belton*, and any belief that it was legal was based upon a misinterpretation of *Belton*, upon which no good faith reliance could be placed. Although the majority opinion in *Gant* contains language somewhat supportive of defendant's position, it also expressly acknowledges that *Belton* had "been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search." (*Gant*, *supra*, __U.S. at p. __ [129 S.Ct. at p. 1718].) *Belton* itself, while citing the justifications set forth in *Chimel*, *supra*, 395 U.S. at page 763, declared the need for a "straightforward" and "workable rule" for police to use, then set forth its broad holding (*Belton*, *supra*, 453 U.S. at pp. 459–460) without additional qualifications, such as "when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." Not surprisingly, most courts, including those of California and the Ninth Circuit, adopted the broad interpretation of *Belton* repudiated in *Gant*. (See, e.g., *Stoffle*, *supra*, 1 Cal.App.4th at pp. 1680–1682; *U.S. v. McLaughlin* (1999) 170 F.3d 889, 891–892.) Indeed, in *Thornton*, *supra*, 541 U.S. 615, the United States Supreme Court not only upheld under *Belton* a search of the passenger compartment of Thornton's car after he had been handcuffed and placed in the back of a police patrol car, but reiterated, "The need for a clear rule, readily understood by police officers and not depending on differing estimates of what items were or were not within reach of an arrestee at any particular moment, justifies the sort of generalization which *Belton* enunciated." (541 U.S. at pp. 622–623.) Thus, we conclude that *Gant* constituted a change in the law as it was understood and applied at the time of the search in this case. As *Gant* itself acknowledged, the broad "reading of *Belton* has been widely taught in police academies and . . . law enforcement

officers have relied on the rule in conducting vehicle searches during the past 28 years . . . ." (*Gant, supra*, __U.S. at p. __ [129 S.Ct. at p. 1722].) The court further noted, "Because a broad reading of *Belton* has been widely accepted, the doctrine of qualified immunity will shield officers from liability for searches conducted in reasonable reliance on that understanding." (*Gant, supra*, __U.S. at p. __ [129 S.Ct. at p. 1723], fn. 11.)

But the issue of whether evidence of the gun recovered here should have been excluded is a distinct issue from that of the constitutionality of the search. (*United States v. Leon* (1984) 468 U.S. 897, 906 [104 S.Ct. 3405] (*Leon*).) The exclusionary rule is not a personal constitutional right of the defendant, but is instead "'a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect'" on future police conduct. (*Ibid.*) "[A]pplication of the exclusionary rule properly has been restricted to those situations in which its remedial purpose is effectively advanced. Thus, in various circumstances, the Court has examined whether the rule's deterrent effect will be achieved, and has weighed the likelihood of such deterrence against the costs of withholding reliable information from the truth-seeking process." (*Illinois v. Krull* (1987) 480 U.S. 340, 347 [107 S.Ct. 1160] (*Krull*).) Whether evidence should be suppressed "turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct." (*Herring v. United States* (2009) 555 U.S. 135, __ [129 S.Ct. 695, 698] (*Herring*).) "[E]vidence should be suppressed 'only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.'" (*Krull*, 480 U.S. at pp. 348–349.) "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. . . . [T]he exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." (*Herring*, 555 U.S. at p. __ [129 S.Ct. at p. 702].)

The United States Supreme Court has applied this good faith exception to the exclusionary rule to objectively reasonable police reliance on subsequently invalidated search warrants (*Leon*, *supra*, 468 U.S. 897), a statute—later held to be unconstitutional—authorizing a warrantless administrative search (*Krull*, *supra*, 480 U.S. 340), and erroneous entries in a law enforcement databases reflecting an outstanding arrest warrant (*Arizona v. Evans* (1995) 514 U.S. 1 [115 S.Ct. 1185] [error caused by court clerk]; *Herring*, *supra*, 555 U.S. 135 [isolated error caused by police employee]). In each of these decisions, the Supreme Court concluded that suppressing the evidence would not advance the goal of deterring future police misconduct.

We conclude the reasoning of *Leon*, *Krull*, *Evans*, and *Herring* must be extended to Calleros's search of defendant's truck, which was conducted in reasonable reliance upon well-settled precedent in effect at the time of the search that authorized that search. If the search of defendant's truck had been conducted after *Gant*, exclusion would be required to deter police from violating *Gant*, but because the state of the law at the time of the search permitted a general search of the passenger compartment, exclusion of the gun would have no deterrent effect on future police misconduct whatsoever. Accordingly, although defendant suffered a Fourth Amendment violation, he was not entitled to suppression of the gun, and the suppression motion was properly denied.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

JOHNSON, J.