

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 KA 0923

STATE OF LOUISIANA

VERSUS

DONALD WAYNE RUSSELL

Judgment Rendered: December 22, 2010

**Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Case No. 03-07-0189**

The Honorable Richard Anderson, Judge Presiding

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Dylan C. Alge
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Baton Rouge, Louisiana**

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State of Louisiana**

**Frederick Kroenke
Baton Rouge, Louisiana**

**Counsel for Defendant/Appellant
Donald Wayne Russell**

BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

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GAIDRY, J.

The defendant, Donald Wayne Russell, was charged by bill of information with possession of three Schedule II controlled, dangerous substances: hydrocodone (count one), methamphetamine (count two), and cocaine (count three), violations of La. R.S. 40:967. The defendant entered a plea of not guilty. The trial court denied the defendant's motion to suppress the evidence. After a trial by jury, the defendant was found guilty of the responsive offense of attempted possession of hydrocodone as to count one, in violation of La. R.S. 40:979 and La. R.S. 40:967; not guilty as to count two; and guilty as charged on count three. On count one the defendant was sentenced to two and one-half years imprisonment at hard labor and on count three the defendant was sentenced to five years imprisonment at hard labor. The trial court ordered that the sentences be served concurrently. The defendant now appeals, challenging the trial court's denial of his motion to suppress the evidence. For the following reasons, we affirm the convictions and sentences.

STATEMENT OF FACTS

On or about February 6, 2007, Corporal Brian Thomas of the Baton Rouge City Police Department was on patrol and observed a vehicle as it swerved while travelling in the eastbound lane on Old Hammond Highway. Corporal Thomas immediately sought information regarding the license plate number and was informed that it was a cancelled or expired Mississippi license plate. Corporal Thomas conducted a traffic stop of the vehicle. Corporal Thomas approached the driver's side of the vehicle and used his flashlight to illuminate the driver's compartment. Corporal Thomas observed the driver holding a clear glass pipe. Corporal Thomas removed the driver, Jon Cook, from the vehicle, advised him of his *Miranda* rights,

conducted a pat-down search for weapons, and placed him in the back of his police unit. Corporal Thomas then removed the defendant from the front passenger side of the vehicle and conducted a pat-down search for weapons.

As back-up officers arrived on the scene, Corporal Thomas went back to the vehicle to retrieve the object that was in plain view. As the driver's door was facing oncoming traffic, Corporal Thomas entered the vehicle through the passenger's door and recovered the glass pipe from the driver's seat. While attempting to exit the vehicle, Corporal Thomas observed a clear, cellophane wrapper containing a pill on the passenger floorboard of the vehicle. Corporal Thomas used the information imprinted on the pill to determine that it was hydrocodone. Having been previously read his *Miranda* rights and handcuffed, the defendant was placed in the police unit and the officers completed a full search of the vehicle. As a result of the search, the officers recovered a burner and propane bottles, a car stereo faceplate case containing another glass pipe, an empty pill bottle for hydrocodone bearing Cook's name, and a set of digital scales from the center console of the vehicle. A large ball-shaped package containing individual smaller bags of pills and white powdery substances was recovered from the passenger side air conditioning vent. The items were later tested at the Louisiana State Police Crime Laboratory and one of the baggies contained 2.95 grams of methamphetamine and additional baggies contained cocaine. Testing further confirmed that the pill recovered from the passenger floorboard contained hydrocodone and acetaminophen.

ASSIGNMENT OF ERROR

In the sole assignment of error, the defendant challenges the trial court's denial of his motions to suppress the evidence. The defendant notes that some of the evidence in this case was in plain view at the time of

discovery but argues that this is not fully dispositive. The defendant argues that since he and Cook had been handcuffed and placed in a police unit before the full blown search of the vehicle, there was no need to search the vehicle for weapons or evidence without a warrant. The defendant contends that the State failed to carry its burden of proving that a warrantless search was necessary as the car was in police custody.

The Fourth Amendment to the United States Constitution and Article I, Section 5 of the Louisiana Constitution protect persons against unreasonable searches and seizures. A defendant adversely affected may move to suppress any evidence from use at a trial on the merits on the ground that it was unconstitutionally obtained. La. Code Crim. P. art. 703A. A trial court's ruling on a motion to suppress the evidence is entitled to great weight, because the court had the opportunity to observe the witnesses and weigh the credibility of their testimony. *State v. Jones*, 2001-0908, p. 4 (La. App. 1st Cir. 11/8/02), 835 So.2d 703, 706, writ denied, 2002-2989 (La. 4/21/03), 841 So.2d 791. Correspondingly, when a trial court denies a motion to suppress, factual and credibility determinations should not be reversed in the absence of a clear abuse of the trial court's discretion, i.e., unless such ruling is not supported by the evidence. See *State v. Green*, 94-0887, p. 11 (La. 5/22/95), 655 So.2d 272, 280-81. In determining whether the ruling on the defendant's motion to suppress was correct, we are not limited to the evidence adduced at the hearing on the motion. We may consider all pertinent evidence given at the trial of the case. *State v. Chopin*, 372 So.2d 1222, 1223 n. 2 (La. 1979).

Prior to *Arizona v. Gant*, ___ U.S. ___, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), the law provided that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a

contemporaneous incident of that arrest, search the passenger compartment of that automobile.” *New York v. Belton*, 453 U.S. 454, 460, 101 S.Ct. 2860, 2864, 69 L.Ed.2d 768 (1981) (footnotes omitted). The Supreme Court in *Gant* expressed concern that *Belton* was being generally applied far beyond the underlying justifications for warrantless vehicle searches incident to the arrest of a recent occupant, i.e., officer safety and preservation of evidence. It observed that *Belton* “has 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*, ___ U.S. at ___, 129 S.Ct. at 1718. Wanting to restrict such searches, the Court in *Gant* re-defined the lawful parameters of such searches, holding that the search-incident-to-lawful-arrest exception to the warrant requirement of the Fourth Amendment is applicable only when a defendant is unsecured and within reaching distance of the passenger compartment at the time of the search. *Gant*, ___ U.S. at ___, 129 S.Ct. at 1719.

However, the Supreme Court further recognized in *Gant* “that circumstances unique to the vehicle context [still] 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.’” Specifically, the Court emphasized that, based on the factual circumstances of the case, “the offense of arrest will [continue to] supply a basis for searching the passenger compartment of an arrestee’s vehicle and any containers therein.” *Gant*, ___ U.S. at ___, 129 S.Ct. at 1719.

Here, Corporal Thomas approached the vehicle after the traffic stop and immediately identified the clear pipe in plain view in Cook’s hands as an object used to smoke narcotics. The driver was moving the object around

in a seeming attempt to find somewhere to put or hide the pipe. At that point a narcotics investigation commenced. In accordance with *Gant*, the police had a reasonable belief that supported the search of the vehicle for evidence pertaining to the possession of controlled dangerous substances. The officers were within the scope of the automobile exception when they initiated the warrantless entry into the vehicle. See *Gant*, ___ U.S. at ___, 129 S.Ct. at 1721, in which the court found that if there is probable cause to believe a vehicle contains evidence of criminal activity, a warrantless search of any area of the vehicle in which the evidence might be found is authorized; and *United States v. Ross*, 456 U.S. 798, 825, 102 S.Ct. 2157, 2173, 72 L.Ed.2d 572 (1982), in which the court held that the automobile exception permits a search that is no broader and no narrower than that which could be authorized pursuant to a warrant. Therefore, the trial court properly denied the motion to suppress and this assignment of error lacks merit.

CONVICTIONS AND SENTENCES AFFIRMED.