No. 18A850

IN THE SUPREME COURT OF THE UNITED STATES

KIRBY GANT,

Petitioner,

v.

UNITED STATES

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Eleventh Circuit erred by finding that the automobile exception applied when the district court made no findings that the vehicle was readily mobile and there was no evidence of any drug crimes prior to Mr. Gant's arrest?

Whether the Eleventh Circuit erred by finding that the plain view exception applied when the police had no lawful right of access to the vehicle and the incriminating nature of contraband was not readily apparent?

Whether the Eleventh Circuit erred by failing to address whether the inevitable discovery doctrine and inventory search exception applied?

Whether the inventory search exception applies when the vehicle was abandoned by police and no inventory was conducted?

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 14.1(b), Petitioner states that all parties appear in the caption of the case on the cover page.

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Petitioner Kirby Gant respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit was not reported, but can be found at 2018 WL 6179423, at *1 (11th Cir. Nov. 27, 2018) and is attached as Appendix A. The September 29, 2017 opinion of the district court is attached Appendix B. The September 6, 2017 report and recommendation of the Magistrate Judge is attached as Appendix C.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its opinion on November 27, 2018. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

I. Nature of the Case, Course of Proceedings, and Disposition Below

This appeal arises from a three-count indictment charging Defendant Kirby Gant ("Mr. Gant") with possession with intent to distribute crack cocaine (21 U.S.C. § 841), possessing a firearm in furtherance of a drug crime (18 U.S.C. § 924), and of being a felon in possession of a firearm (18 U.S.C. § 922). Doc. 1.[1]

On July 7, 2017, Mr. Gant filed a Motion to Suppress and Supporting Memorandum of Law (the "Motion to Suppress"), seeking to suppress evidence obtained from his person[2] and from a vehicle located nearby. Doc. 23. The Government opposed Mr. Gant's Motion to Suppress, Doc. 27, and an evidentiary hearing was held on August 30, 2017, before the Magistrate Judge. At the evidentiary hearing, two law enforcement witnesses testified, among other witnesses.

On September 6, 2017, the Magistrate Judge entered his Report and Recommendation that the Motion to Suppress be denied. Appx. C. On September 27, 2017, Mr. Gant submitted his Objections to the Report and Recommendation. Doc. 44. The Government did not submit any objections to the Report and Recommendation. On September 29, 2017, the district court entered an Order adopting the Magistrate Judge's Report and Recommendation in all respects. Appx. B.

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[1] All references to the record in case 8:16-cr-00531-JSM-CPT (M.D. Fla.) will be indicated as "Doc. #" followed by, when appropriate, the page or pages indicated as "p. #."

[2] Mr. Gant did not challenge the search of his person on appeal.

Mr. Gant attempted to enter a conditional plea premised on preserving his right to appeal the denial of the Motion to Suppress. Doc. 47. However, the Government would not consent to the conditional plea. *See* Federal Rule of Criminal Procedure 11(a)(2) (requiring government consent to conditional pleas). On November 30, 2017, Mr. Gant was tried without a jury as part of a bench trial based on stipulated facts. At the conclusion of the bench trial the district court found Mr. Gant guilty as to all three counts. Doc. 51. Mr. Gant was sentenced to two hundred sixty months (260) of incarceration. Doc. 73.

A Notice of Appeal was timely filed by Mr. Gant on March 29, 2018. Doc. 75. The Eleventh Circuit Court of Appeals affirmed the judgment of the District Court. Appx. A.

II. Statement of Facts

Bradenton Police Officers Christopher Capdarest ("Capdarest") and Bryan Stay ("Stay"), along with three others, were on patrol on December 5, 2016, at about 3:48 a.m. in the area of the 300 block of 12th Avenue West in Bradenton. Doc. 44-1, p. 5, line 12; p. 7, line 4.

The Officers observed a green SUV in the parking lot area of an apartment complex.[3] *Id*., p. 45, lines 4-8. The officers were not acting on a tip of criminal activity in the area, nor did they observe Mr. Gant commit any crime before they

[3] At the hearing on the Motion to Suppress, there was a dispute regarding whether the apartment complex was private property or government property. For purposes of the issues involved in this petition, the distinction is not relevant.

confronted him. There were no other persons in the area. The Officers did not observe any criminal conduct, but they approached the vehicle nonetheless. *Id.*, pp. 45-46, lines 19-25, 1-3.

Capdarest went to the driver's door and Stay went to the passenger door. The officers never saw the vehicle move. *Id.*, p. 23, lines 10-13; p. 51, lines 15-17. The motor was not running. *Id.*, p .23, lines 1-5; p. 51, lines 4-6. Further, no officer could testify that they even saw keys in the ignition. *Id.*, p. 23, lines 6-9; p. 51, lines 7-14.

Capdarest testified that he said, "Hey bud" towards the occupant, later determined to be Mr. Gant. *Id.*, p. 17, lines 1-7. Very shortly thereafter he heard Stay yell, "Gun." *Id.* Mr. Gant then exited the vehicle and pushed Capdarest in an apparent effort to flee. *Id.* Capdarest grabbed Mr. Gant's wrists, they fell to the ground and, after a short struggle, Mr. Gant was handcuffed and searched. *Id.*, p. 17, lines 8-14. Officer Capdarest testified that, prior to the effort to flee, Mr. Gant was not under arrest. *Id.*, p. 18, lines 20-23. Mr. Gant was then arrested for battery on a law enforcement officer and obstruction. *Id.*, p. 18-19, lines 24-25; 1. According to Capdarest, all of this happened within fifteen or twenty seconds. *Id.*, p. 18, line 6.

A subsequent search of Mr. Gant's person revealed a small amount of a substance appearing to be marijuana and a bag of unidentified pills, along with cash in a jacket pocket. Those items were not field tested until after the search of the

vehicle was completed. Doc. 23-1, p. 9. Capdarest took Mr. Gant to the rear of the vehicle and he was placed in the rear of the cruiser. Doc. 44-1, p. 19, lines 17-18.

Officer Stay then testified regarding his regarding the arrest and subsequent search. He testified that, upon confronting Mr. Gant, he approached the passenger side door of the vehicle and saw a firearm in a cup holder. He yelled out loudly "gun." Mr. Gant exited the vehicle, and he and Capdarest began to struggle. Stay ran around the vehicle to assist Capdarest.

Thereafter, Stay searched the vehicle. The report Officer Stay wrote the night of the arrest does not mention seeing any alleged drugs before searching the vehicle. Doc. 23-1, p. 10. Instead, that report first mentions Officer Stay viewing drugs in the vehicle after the search had been commenced. *Id.* However, at the evidentiary hearing, Stay claimed for the first time that, before entering the vehicle, underneath the firearm he observed a plastic bag with what he suspected to be crack cocaine. Doc. 44-1, p. 55, lines 16-23. Officer Stay did not testify as to why he believed the contents of the bag were contraband, nor did he testify as to a description of the contents. There was no testimony about the officer's training or experience in being able to identify drugs from sight.[4] The alleged contraband was only field tested after the search was complete. Doc. 23-1, p. 9.

[4] The only testimony regarding Officer Stay's experience was that he had approximately eight years of experience between two different police departments, first as a patrol officer then a detective on a special investigation unit. Doc. 44-1, p. 43-44, lines 8-25; 1-4. At the time of Mr. Gant's arrest, Officer Stay was a patrol officer.

After Mr. Gant's arrest, the vehicle was not impounded by police, but instead was taken to a private tow yard and abandoned. Doc. 44-1, p. 22, lines 22-25. During the evidentiary hearing, there was no testimony that an inventory of the vehicle was ever actually conducted. Instead, the Government asked Officer Capdarest "As a part of your procedures for impounding a vehicle, are you all required to search the vehicle?" *Id.*, p. 21, lines 10-11. Officer Capdarest answered "Yes, ma'am. That's also another safety feature. For example, if someone said I had a TV in my car, we would do an inventory search on the vehicle and we list that down on the paper. So if they come to pick up the vehicle the next day and say I had a TV in that car and now it's stolen, we can show well this is what the list of items you had in your car are and if they had a TV or if they didn't." *Id.*, lines 12-20.

The Government did not offer any inventory into evidence. There was no testimony that such an inventory took place. The police reports provided in discovery do not indicate that a complete inventory actually occurred. Instead, one such report that lists items seized from the vehicle and describes only a cell phone, the contraband found both on Mr. Gant's person and in the vehicle, and then simply lists "***ALL OTHER ITEMS***" and "***MISC BELONGINGS***." Doc. 23-1, pp. 5-8 (emphasis in original). There was no attempt to identify such "items," despite a report by another officer indicating that there were "a set of keys" and a "phone charger" in the vehicle, among other things. *Id.*, p. 9.

III. The District Court Order

The district court denied the Motion to Suppress. It adopted the Report and Recommendation of the Magistrate holding that the "search of the passenger compartment and seizure of the firearm and crack cocaine was justified under the plain-view doctrine and the *Carroll* doctrine." Appx. C: 10. The district court found that Officer Stay "was lawfully in a position from which to view the inside of the vehicle," and that Stay "went to search the vehicle and before entering he saw a plastic bag containing suspected crack cocaine." Appx. C: 10. The district court also concluded that "While the incriminating nature of the firearm may not have been immediately apparent when it was initially observed, Stay's observation of the crack cocaine and the firearm upon a second look subsequent to Mr. Gant's arrest supports a finding that the vehicle contained contraband and evidence of a crime." Appx. C:11.

The Court also found that, even if the plain-view doctrine did not apply, the automobile exception would allow for a warrantless search because "the Officers were possessed of probable cause to believe the vehicle contained additional contraband and Stay's entry and seizure of the firearm and crack cocaine was justified under the automobile exception to the warrant requirement." Appx. C: 11. The lower court made no findings regarding the mobility of the vehicle.

Based on those rulings, the lower court did not detail its findings as the propriety of a search of the vehicle incident to arrest. Appx. C:12. However, it did conclude that "Upon a strict reading of *Gant*, Defendant has the better of the argument, and, if called upon to do so, I would find the Officers cannot justify the

search of the vehicle under this exception to the warrant requirement." Appx. C:12 n.9 (citing *Arizona v. Gant*, 556 U.S. 332 (2009)).

Further, the lower court also did not find it necessary to detail its findings as to the Government's argument "that even if the search was illegal, the firearm and crack cocaine would inevitably been discovered during the routine inventory search conducted in connection with the towing of the vehicle to a tow-yard for safekeeping." Appx. C:12. However, the district court did find, without citation, that "an inventory search of the vehicle was performed." Appx. C:12, n.10. It further found that "Inventory searches conducted in accordance with standard operating procedures adopted by law enforcement agencies are reasonable under the Fourth Amendment." Appx. C:12,n.10.

Thus, the district court denied the Motion to Suppress.

IV. The Court of Appeals' decision

Mr. Gant timely appealed to the Eleventh Circuit Court of Appeals. That Court affirmed.

The Eleventh Circuit found that the automobile exception applied because there was "sufficient evidence to prove that the car Gant was sitting in was readily mobile," because the "door was open and the interior lights were on . . ." Appx. A:5. It did not explain how an open door or a light can cause a vehicle to be mobile. Further, it found that "Gant provides no binding precedent requiring the district court to make an explicit finding of mobility." Appx. A:5. The Court of Appeals further held that probable cause existed to search the vehicle. Appx. A:5.

The appellate court also concluded that the plain view exception applied because the officers had a lawful right of access to the vehicle and they could see a firearm in the cup holder. The Court found, without more, that the totality of the circumstances made "demonstrated the requisite incriminating character of the" firearm. Appx. A:6-7. The appellate court did not make any findings regarding the fact that there was no testimony regarding the officer's experience or training to identify drugs by sight.

Based on its holdings regarding the automobile exception and the plain view exception, the Court of Appeals declined to decide whether the inevitable discovery doctrine or the inventory search exception applied. Appx. A:7.

REASONS FOR GRANTING THE WRIT

This Court should grant review and reverse the Eleventh Circuit decision to affirm the trial court's denial of Mr. Gant's motion to suppress evidence. The Eleventh Circuit erred because no exceptions to the warrant requirement applied.

First, the Eleventh Circuit should not have affirmed the district court because it incorrectly held that the automobile exception applied. The automobile exception requires two findings: (1) that the vehicle was readily mobile; and (2) that there was probable cause that the vehicle contained contraband. Here, the district court made no findings that the vehicle in question was readily mobile. Indeed, the only testimony here demonstrates that the vehicle was not readily mobile. Further, there was no probable cause to believe that the vehicle contained contraband because the only crime that had occurred before the search was a battery on a law enforcement officer, which did not involve any contraband.

The Eleventh Circuit's finding that the vehicle was readily mobile was error. Lights and radios do not make a vehicle mobile. Further, the appellate court incorrectly held that the district court did not need to make an explicit finding about one of two prongs of the test for whether a constitutional right is being violated. That flies in the face of established case law, as detailed below.

The plain-view doctrine likewise did not apply because police did not have a lawful right of access to the alleged contraband. No warrant exception permitted police to access the interior of the vehicle. Further, the incriminating nature of the contraband was not readily apparent. With respect to a bag identified by an officer

as rock cocaine, there was no testimony as to its contents or the officer's ability or experiencing identifying specific drugs by sight. Further, the contents required additional field testing that only occurred after the search was completed. The appellate court made no findings regarding the lack of testimony regarding the officer's experience. Further, case law holds that a gun by itself is not readily identifiable as incriminating.

Finally, because the two exceptions above do not apply, the Eleventh Circuit should have examined whether the items should have been inevitably discovered as part of an inventory search. If it had, the appellate court should have held that no such inventory search actually occurred. The vehicle was never impounded into police custody. Instead, it was taken to a private tow yard and abandoned. No meaningful inventory was ever actually taken because there was no itemized list of the contents of the vehicle. There was no testimony that such an inventory actually occurred.

Because no other exceptions to the warrant requirement apply,[5] the search of the vehicle was illegal, and the evidence seized therefrom must be suppressed.

[5] As discussed above, the district court held that the search incident to arrest exception does not apply. Appx. C:12 n.9.

I. The Automobile Exception does not apply because there was no finding that the vehicle was readily mobile and no probable cause to believe it contained contraband

The automobile exception to the warrant requirement has two elements: ready mobility and probable cause. Here, neither element was satisfied and the appellate court incorrectly found that the vehicle was mobile.

A. The district court made no findings that the vehicle was readily mobile

The appellate court erred by finding the automobile exception applies because the Government did not prove, nor did the lower court find, that the vehicle was "readily mobile."

Under the automobile exception to the warrant requirement, also known as the *Carroll* doctrine, "If a car is ***readily mobile*** and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle without more." *Pennsylvania v. Labron*, 518 U.S. 938, 940, 116 S. Ct. 2485, 2487, 135 L. Ed. 2d 1031 (1996) (internal citations omitted) (emphasis added). This Court likewise held in *California v. Carney*, 471 U.S. 386, 390-91 (1985), that "[t]he capacity to be 'quickly moved' was clearly the basis of the holding in *Carroll*, and our cases have consistently recognized ready mobility as one of the principal bases of the automobile exception." In *United States v. Ross*, 456 U.S. 798, 806 (1982), this Court once again emphasized that "an immediate intrusion is necessary" because of "the nature of an automobile in transit...." The mobility of automobiles, the Court observed, "creates circumstances of such exigency that, as a practical necessity,

rigorous enforcement of the warrant requirement is impossible." *South Dakota v. Opperman*, 428 U.S. 364, 367 (1976).

While all that is required to be "readily mobile" is that a vehicle be "operational," the district court erred by making no findings regarding mobility. *United States v. Watts*, 329 F.3d 1282, 1286 (11th Cir. 2003). Tellingly, on appeal, the Government conceded that no such finding was made. The appellate court found only that "Gant provides no binding precedent requiring the district court to make an explicit finding of mobility." Appx. A:5.

The Fourth Amendment question of whether a vehicle is readily-mobile requires a district court to make specific findings. *See e.g. United States v. Beene*, 818 F.3d 157, 165 (5th Cir. 2016) (vacating judgment and remanding because the "district court did not make factual findings about whether exigent circumstances were present sufficient to justify a warrantless search under the automobile exception."); *United States v. Bulluck*, 556 Fed. Appx. 18, 20-21 (2d Cir. 2014) (remanding because district court did not make findings regarding probable cause under the automobile exception); *United States v. Ramstad*, 219 F.3d 1263, 1265 (10th Cir. 2000) ("On remand, the district court make specific findings as to whether the original traffic stop violated the Fourth Amendment."); *Savoy v. United States*, 604 F.3d 929, 937 (6th Cir. 2010) (remanding because "[t]he district court failed to make findings of fact to support that the 'reasonable expectation of privacy . . .'"); *United States v. Robinson*, 625 F.2d 1211, 1217 (5th Cir. 1980) (reversing because the district court did not make findings as to whether a reasonable person would have

believed he was free to leave law enforcement encounter).[6] Here, the appellate court erred by failing to require the district court to make any such findings.

B. There was no evidence that the vehicle was readily mobile

The evidence put forward during the hearing on the Motion to Suppress demonstrates that the vehicle in question was not "readily mobile."

Mr. Gant was not pulled over as part of a traffic stop – the vehicle was stationary during the entire encounter with police. The officers never saw the vehicle move. *Id*., p. 22, lines 10-13; p. 51, lines 15-17; *see c.f. United States v. Garcia*, 433 Fed. Appx. 741, 744 (11th Cir. 2011) ("The Hummer plainly was operational because law enforcement officers observed Garcia driving it shortly before his arrest."); *United States v. Alston*, 598 Fed. Appx. 730, 734 (11th Cir. 2015) ("The fact that Alston drove the Maxima to the drug deal shows that it was operational."). The motor was not running. Doc. 44-1, p .23, lines 1-5; p. 51, lines 4-6. Further, no officer could testify that they even saw keys in the ignition. *Id*., p. 23, lines 6-9; p. 51, lines 7-14. The vehicle had to be towed from the scene by a tow truck and was taken to a private tow lot and treated as abandoned. *Id*., p. 21, lines 5-6. *See United States v. O'Connell*, 408 F. Supp. 2d 712, 723–24 (N.D. Iowa 2005) (finding automobile exception did not apply because "[t]he van was on private

[6] In support of its position that no findings were required, the Government cited only *United States v. $242,484.00*, 389 F.3d 1149, 1154 (11th Cir. 2004) (en banc). However, that case was a civil forfeiture action and did not address the type of important constitutional rights involved in this criminal action.

property, not readily mobile and not licensed to operate on public streets; a reasonable and objective observer would conclude that the van was not being used as a vehicle.").

In its opinion, the appellate court found that because "Gant was in the driver's seat, the overhead lights were on, and the radio was playing," the vehicle "appeared capable of moving." Appx. A:5. The appellate court cited no authority for the proposition that this was sufficient to deem a vehicle operational. Nor did the appellate court explain why the lights and radio made the vehicle "appear[] capable of moving." *Id.*

The appellate court cited *United States v. Alexander*, 835 F.2d 1406, 1409 (11th Cir. 1988). However, *Alexander* is inapplicable. In *Alexander*, the defendant had been observed "driving [the vehicle] during the several days prior to the search." *Id.* at 1408. There was therefore a basis to find that the vehicle was "movable." *Id.* at 1409. The defendant argued only that the vehicle was stationary at the time of the search. The government argued that exigency required the search because it could someone later could have driven the vehicle away or sought to destroy evidence, but that such evidence of exigency was "not overwhelming," merely sufficient. *Id.* at 1410.

The district court made no findings as to the ready mobility or operation of the vehicle and the evidence presented demonstrates that the vehicle was not readily mobile. Further, the appellate court's findings that the vehicle was operational is not supported by law or fact. Indeed, to hold that the scant indicia relied on by the

appellate court makes a vehicle operational will render this prong of the automobile exception meaningless. Thus, the appellate court erred and the Order denying Mr. Gant's Motion to Suppress should be reversed.

C. There was no probable cause to believe the vehicle contained contraband

The second prong of the automobile exception requires that "agents have probable cause to believe the vehicle contains contraband or evidence of a crime," before searching the vehicle. *United States v. Tamari*, 454 F.3d 1259, 1261 (11th Cir. 2006). Here, the district and appellate court erred in finding such probable cause existed.

Prior to the search of the vehicle, Mr. Gant had been detained only for "battery on [a law enforcement officer] and obstruction," not a drug crime. Doc. 44-1, p. 18, lines 18-19. Those crimes do not necessarily entail the use or implementation of any contraband. Further, as discussed in detail below, and as found by the district court, the mere presence of a gun is not evidence of a crime. Appx. C:11. Moreover, one officer's testimony as to his belief that an untested bag contained crack cocaine is unsupported, also as detailed below. Prior to searching the vehicle, the only contraband law enforcement had found was on Mr. Gant's person and was a small amount of a substance appearing to be marijuana, and unidentified pills. Those items were only identified later by a field test conducted after the search of the vehicle had already been completed. Doc. 23-1, p. 9. Before the search, those untested items do not give rise to a finding of probable cause that would implicate the

automobile exception. For these reasons, no probable cause existed to believe that the vehicle contained any contraband or evidence of any other crimes.

Because neither prong of the automobile exception can be satisfied, it was error for the district court to deny the Motion to Suppress and for the appellate court to affirm it.

II. The Plain-View Doctrine did not apply here because the police did not have a lawful right of access to the vehicle and the incriminating nature of the contraband was not readily apparent

Pursuant to 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, they may seize it without a warrant." *Minnesota v. Dickerson*, 508 U.S. 366, 375, 113 S. Ct. 2130, 2136–37, 124 L. Ed. 2d 334 (1993).

The plain-view doctrine is inapplicable here because (1) officers did not have a lawful right to access objects in the vehicle; (2) the incriminating nature of the firearm was not readily apparent; and (3) the officer's testimony regarding the presence of crack before testing was not supported by evidence.

A. Police had no lawful right of access to the vehicle because no warrant exceptions apply

Here, law enforcement officers did not have a lawful right of access to the vehicle because no warrant exceptions applied.

Under the plain-view doctrine, "any valid warrantless seizure of incriminating evidence" requires that the officer "have a lawful right of access to the object

itself." *Collins v. Virginia*, No. 16-1027, 2018 WL 2402551, at *6 (U.S. May 29, 2018) (quoting *Horton v. California,* 496 U.S. 128, 136–137, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990)); *see also id.,* at 137, n. 7, 110 S.Ct. 2301 ("'[E]ven where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure'"); *G.M. Leasing Corp. v. United States,* 429 U.S. 338, 354, 97 S.Ct. 619, 50 L.Ed.2d 530 (1977) ("It is one thing to seize without a warrant property resting in an open area ..., and it is quite another thing to effect a warrantless seizure of property ... situated on private premises to which access is not otherwise available for the seizing officer.").

Here, as detailed above, the automobile exception does not apply. *Collins*, 2018 WL 2402551, at *7 ("Just as an officer must have a lawful right of access to any contraband he discovers in plain view in order to seize it without a warrant . . . so, too, an officer must have a lawful right of access to a vehicle in order to search it pursuant to the automobile exception."). Likewise, no other exception to the warrant requirement applies here. Because no exception to the warrant requirement applies, law enforcement officers had no lawful right to access the vehicle without a warrant, even if it contained contraband. *Collins*, 2018 WL 2402551, at *6 ("Had Officer Rhodes seen illegal drugs through the window of Collins' house, for example, ***assuming no other warrant exception applied***, he could not have entered the house to seize them without first obtaining a warrant.") (emphasis added). *See also Coolidge v. New Hampshire*, 403 U.S. 443, 468, 91 S. Ct. 2022, 2039, 29 L. Ed. 2d 564 (1971) (collecting cases).

The appellate court's holding that police had a lawful right of access to the vehicle because the automobile exception applied was error.

B. The incriminating nature of the contraband was not readily apparent

Further, even if the automobile exception applied, the plain-view doctrine was still improperly applied because the incriminating nature of the contraband was not readily apparent.

As this Court held in *Dickerson*, "If ... the police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the object—i.e., if 'its incriminating character [is not] 'immediately apparent," '—the plain-view doctrine cannot justify its seizure." 508 U.S. 366, 375, 113 S.Ct. 2130, 2137, 124 L.Ed.2d 334 (1993) (internal citations omitted); *see also United States v. Lall*, 607 F.3d 1277, 1291 (11th Cir. 2010).

Here, there were two pieces of alleged contraband relevant to the application of the plain-view doctrine – a firearm and a bag. The district court correctly found that "the incriminating nature of the firearm may not have been immediately apparent when it was initially observed . . ." Appx. C:11. However, the district court erred by holding that an officer seeing a "plastic bag containing suspected crack cocaine," without testimony regarding the basis of that suspicion, supported a finding that the material in the bag was contraband. Appx. C:11.

During the hearing on the Motion to Suppress, Officer Stay, who conducted the search of the vehicle, testified that prior to searching the vehicle, he saw "a bag sitting

underneath the firearm," Doc. 44-1, p. 55, line 23, and "inside the bag was what I believed to be rock cocaine." *Id*., lines 2-3.

Moreover, the contents of the bag were only field tested and determined to be illicit after the search of the vehicle had already been completed. Doc. 23-1, p. 9. Thus, before the search, the only testimony was that there was a bag of *something* in the car. That was insufficient evidence for the district court to conclude that the incriminating nature of the contents of the bag were "readily apparent." *See Lall*, 607 F.3d at 1291; *United States v. Jackson*, 155 F. Supp. 3d 1320, 1333 (S.D. Fla. 2014); *United States v. Sanchez*, Case No. 1:11-cr-239-25, 2012 WL 4325822, at *3-4 (N.D. Ga. July 10, 2012).

The appellate court held that "the totality of the circumstances demonstrated the requisite incriminating character of the items viewed." Appx. A:7. It held that the officer did not need to "know with absolute certainty" that the bag contained cocaine. Appx. A:7. But the issue is not whether the bag might have been something else, it was that there was no foundation whatsoever for the officer to reach his conclusion and for the district court to ratify it.

The appellate court's sole comment was that there should be an allowance for "common sense view to the realities of normal life." Appx. A:7. (citing *United States v. Herzbrun*, 723 F.2d 773, 775 (11th Cir. 1984)).[7] There is nothing normal or

[7] *Herzbrun* has no legal or factual application here. It involved a man putting a bag through an airport X-ray machine. When the security officer saw an unidentifiable mass and tried to search the bag, the defendant grabbed the bag and fled. He was detained and a drug-sniffing dog alerted the officers to the presence of drugs in the bag and the officers then obtained a warrant. *Id.* at 774-75.

common sense about the testimony of law enforcement regarding identification of specific drugs. A person living their "normal life" would not be able to tell crack cocaine from powder cocaine, baking soda, rat poison, heroin, sugar, etc., no matter how much "common sense" they exercise. It requires specific training and experience, of which there was no testimony here. The officer did not testify that he saw something that looked like "drugs," he testified that it looked specifically like "rock cocaine." There was no basis for that testimony or a holding affirming it.

Eleventh Circuit precedent establishes that law enforcement officers may testify "based upon their particularized knowledge garnered from years of experience within the field." *United States v. Cannon,* 149 Fed. Appx. 937, 941 (11th Cir. 2005) (quoting *Tampa Bay Shipbuilding & Repair Co. v. Cedar Shipping Co.,* 320 F.3d 1213, 1223 (11th Cir. 2003)). Courts typically rely on an officer's credentials as an expert in making findings regarding the identification of drugs. *See e.g. United States v. Evans*, 662 Fed. Appx. 681, 682 (11th Cir. 2016) (relying on officer's conclusions regarding identification of drugs "based on his 19 years of experience, multiple drug arrests, narcotics sight identification classes, and over 2,000 hours of training."); *United States v. Baggett*, 954 F.2d 674, 678 (11th Cir. 1992) (relying on testimony of agent "based on his extensive training in the sight identification of drugs, [and] his encounters with cocaine on over 300 separate occasions."); *United States v. Lillard*, 113 F.3d 1239 (8th Cir. 1997) (relying

Further, *Herzbrun* did not involve questions of the plain view exception, only whether there was probable cause to obtain the warrant.

on testimony of two experts trained in identifying drugs to identify drugs were crack cocaine by sight); *United States v. Jennings*, 348 Fed. Appx. 165, 166 (7th Cir. 2009) (relying on FBI agent testifying "as an expert in identifying crack cocaine," that a substance was crack); *United States v. Pettiford,* 517 F.3d 584, 593 (D.C. Cir. 2008) (narcotics expert opined that the "cluster of white ... rock-like substance ... was cocaine base which is also known as crack cocaine").

Here, there was no testimony from the officer who allegedly identified the crack regarding his experience, credentials, or training to render him an expert as such.[8] Further, there was no testimony regarding the color, shape, packaging, etc., to support the identification. There was no testimony as to why Officer Stay had that belief, nor did he testify as to a description of the contents. No testimony at all was given to support the officer's conclusion. Indeed, Officer Stay's testimony at the hearing on the Motion to Suppress conflicts with his contemporaneous report from the arrest. That report only mentions the presence of a bag allegedly containing rock cocaine ***after*** the search of the vehicle had already commenced. Doc. 23-1, p. 10.

The Eleventh Circuit's opinion makes clear that it incorrectly conflated the probable cause standard with the "immediately apparent" requirement of the plain view exception. As this Court has held, if "police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the

[8] The only testimony about Officer Stay's experience was that he had worked in law enforcement for approximately eight years and was a patrol officer on the night of Mr. Gant's arrest. The Government did not ask, and Officer Stay did not testify, regarding his experience identifying drugs. Doc. 44-1, p. 43-44, lines 8-25; 1-4.

object-i.e., if 'its incriminating character [is not] 'immediately apparent." *Dickerson*, 508 U.S. at 375. Here, the only testimony was that an officer saw something that for some unspecified reason made him think that object was illegal. There was no testimony *at all* to create any foundation whatsoever for the conclusion that a bag contained drugs. That is insufficient for a finding of probable cause because there was no testimony that the characteristics made it "immediately apparent" that the bag was drugs.

Thus, law enforcement officers had no lawful right of access to the vehicle because the automobile exception did not apply. Further, there was insufficient evidence to conclude that the incriminating nature of the contraband was readily apparent. Therefore, the plain-view doctrine does not apply.

III. The Inventory Exception does not apply because the vehicle was never impounded and there is no evidence that an inventory was actually conducted

The appellate court held that it did not need to reach the issue of whether the inventory search exception was applicable here. Appx. A:7. As discussed above, neither the automobile exception nor the plain view exception applied. Therefore, the appellate court should have reached the inventory exception question. If it had, it should have determined that the exception did not apply here because the car was never actually impounded, and no meaningful inventory was ever conducted.

A warrant exception exists for an inventory search of impounded vehicles. *Colorado v. Bertine*, 479 U.S. 367, 371 (1987). "The policy or practice governing inventory searches should be designed to produce an inventory. The individual

police officer must not be allowed so much latitude that inventory searches are turned into 'a purposeful and general means of discovering evidence of crime....'" *United States v. Khoury*, 901 F.2d 948, 958 (11th Cir. 1990) (*quoting Florida v. Wells*, 495 U.S. 1 (1990)). An inventory search is not a surrogate for investigation, and the scope of an inventory search may not exceed that necessary to accomplish the ends of the inventory. *United States v. Laing,* 708 F.2d 1568, 1570 (11th Cir. 1983) (per curiam), *cert. denied,* 464 U.S. 896, 104 S.Ct. 246, 78 L.Ed.2d 235 (1983).

A. The vehicle was never impounded by police

Several courts have held that, when a vehicle is not impounded by the police, the inventory exception does not apply. *See e.g. United States v. Deleon*, No. CR 6:14-89, 2015 WL 7583139, at *3 (S.D. Tex. Nov. 24, 2015), aff'd, 689 Fed. Appx. 278 (5th Cir. 2017) ("The Court finds that because the vehicle was not impounded, the inventory search exception does not apply here."); *Gombert v. Lynch*, 541 F. Supp. 2d 492, 501 (D. Conn. 2008) ("The Plaintiff's car was not impounded, and there is no indication that at any time during or after the Plaintiff's arrested [sic], the NMPD otherwise had custody of the Plaintiff's car. As a result, the court fails to see how the inventory exception applies to this situation."); *Aponte v. City of Chicago*, No. 08 C 6893, 2010 WL 2774095, at *6 (N.D. Ill. July 14, 2010) ("[A]s the vehicle was by the Defendants' own evidence *not* impounded, a search of it could not have been lawful under the authority upon which Defendants rely, which allows for searches of impounded vehicles but makes no mention of vehicles which are merely towed by

unspecified persons and not impounded by the police."). The Government did not contest that point on appeal.

Here, the vehicle in question was never impounded. Doc. 44-1, p. 22, lines 22-25 ("Q: Was the vehicle actually impounded or was it just towed to another lot? A: It was towed as ***abandoned*** from the scene. Q: So it wasn't impounded in a Police Department lot? A: Correct, it goes to a tow yard, directly from the scene to a tow yard.") (emphasis added). Instead, it was simply deemed abandoned. *Id.*

Impoundment and abandonment are opposite things. Black's Law Dictionary, Seventh Edition, defines "impound" as "To place (something such as a car or other personal property) in the custody of the police or the court, often with the understanding that it will be returned intact at the end of the proceeding." And it defines "abandonment" as "The relinquishing of a right or interest with the intention of never again claiming it." *Id.* The purpose of impoundment is to retain control, the purpose of abandonment is to relinquish control.

The distinction between a vehicle being impounded versus being abandoned is significant. Searches of impounded vehicles are constitutional because "they 'serve to protect an owner's property ***while it is in the custody of the police***, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger.'" *Bertine*, 479 U.S. at 371-72 (emphasis added). If a vehicle is not in police custody, then the basis for the Fourth Amendment intrusion is lost. Here, the only evidence was that, after it was towed away, the vehicle was deemed to be abandoned.

There was no evidence that the vehicle remained in police custody, such as it would have had it been impounded in a police department lot.

Because the vehicle was never actually impounded, the inventory exception does not apply.

B. No inventory was actually conducted

The inventory exception also does not apply here because no there is no evidence an inventory was ever actually conducted here. No inventory was entered into evidence and no officer testified that an inventory was conducted.

During the hearing, the Government asked Officer Capdarest a hypothetical question – "As a part of your procedures for impounding a vehicle, are you all required to search the vehicle?" Doc. 44-1, p. 21, lines 10-11. Officer Capdarest answered in general about procedures – "Yes, ma'am. That's also another safety feature. For example, if someone said I had a TV in my car, we would do an inventory search on the vehicle and we list that down on the paper. So if they come to pick up the vehicle the next day and say I had a TV in that car and now it's stolen, we can show well this is what the list of items you had in your car are and if they had a TV or if they didn't." *Id.*, lines 12-20.

Officer Capdarest's rationale would make sense if an inventory was maintained of each item found in the vehicle. That way, police could verify to the owner of property claimed to be missing whether such property was actually in the vehicle, as Officer Capdarest himself testified.

But the officers here never conducted such an inventory and the Government never entered such an inventory into evidence. Instead, except for the contraband and cash allegedly found on Mr. Gant, the inventory simply listed "***ALL OTHER ITEMS***." Doc. 23-1, p. 6. But the police reports indicate that there were other specific items in the vehicle, including a phone charger, keys, and lottery tickets, among other items. *Id*., p. 9. Those items were listed in the report of Officer Weldon and not listed specifically in the alleged inventory. *Id*.

Even by Officer Capdarest's own testimony, describing multiple pieces of property as "***ALL OTHER ITEMS***" would not protect officers from claims of theft or malfeasance. No other inventory was admitted into evidence or provided in discovery.

Despite the flaws with the alleged "inventory" conducted here, the Magistrate Judge's Report and Recommendation incorrectly held that "the vehicle was towed to a tow yard in accordance with the department's standard operating procedure. In accordance with those procedures, an inventory search of the vehicle was performed." Appx. C:12. The district court then also incorrectly held that "Officers impounded the vehicle pursuant to standard operating procedures. Thus, the impoundment was constitutionally proper." Appx. B:1.

As discussed above, the evidence shows that the vehicle was not impounded, it was abandoned. Moreover, there was no testimony that an inventory search was conducted here or that any such procedures were followed here. As discussed above,

no such list was actually created here. And Officer Capdarest never testified that the vehicle in question was actually inventoried.

There is no evidence in the record that such an inventory actually occurred, regardless of what standard procedures may be. Thus, the lower Court's finding that an "inventory search of the vehicle was performed," and that therefore discovery of the contraband was inevitable was made in error. The district court should be reversed.

CONCLUSION

If the decision of the Eleventh Circuit Court of Appeals remains in place, the ready-mobility prong of the automobile exception will be rendered meaningless. Likewise, the inventory exception would become worthless because a vehicle need not even be in police custody and no actual inventory need be conducted. The Court should grant Petitioner Kirby Gant's petition for a writ of certiorari. The Court should reverse the Eleventh Circuit's determination and reverse the decision to deny Mr. Gant's Motion to Suppress.

Dated: February 25, 2019

Respectfully Submitted,

/s/ Gus M. Centrone

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