No. 19-5596

IN THE SUPREME COURT OF THE UNITED STATES

ERIC T. LATHAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether police officers violated the Fourth Amendment by searching petitioner's car after he had handed them a half-full can of beer through the car window, an officer had seen what appeared to be another can of beer in the car, the officers had probable cause to arrest petitioner for drunk driving, and they had handcuffed petitioner and placed him in the back of a patrol car after observing and smelling signs of intoxication.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D. Mich.):

United States v. Latham, No. 17-cr-4 (Sept. 6, 2017)

United States Court of Appeals (6th Cir.):

United States v. Latham, No. 17-2125 (Feb. 12, 2019)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A2, at 1-9) is not published in the Federal Reporter but is reprinted at 763 Fed. Appx. 428.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 2019. A petition for rehearing was denied on April 4, 2019 (Pet. App. A3, at 1). The petition for a writ of certiorari was filed on June 18, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Michigan, petitioner was convicted on one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Judgment 1. He was sentenced to 60 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A2, at 1-9.

1. Lansing, Michigan police pulled over petitioner for driving a car with excessively tinted windows. Pet. App. A2, at 1; Suppression Hr'g Tr. 90. During the traffic stop, officers saw an open can of beer in the car and asked petitioner to hand it to them. Pet. App. A2, at 1; Suppression Hr'g Tr. 91. Petitioner handed it to an officer, who observed that the can was half full, cold, and had condensation on it. Ibid. The officer also saw what appeared to be another beer can in the car. Pet. App. A2, at 1. The officers asked petitioner to step out the car, at which point they noticed that he "showed signs of intoxication, including the smell of intoxicant on his breath and glassy eyes." Id. at 1-2; see Suppression Hr'g Tr. 92. They handcuffed petitioner and placed him in the back of a patrol car. Pet. App. A2, at 2; Suppression Hr'g Tr. 92.

Officers then searched the passenger compartment of petitioner's car, finding the other can of beer, a previously opened bottle of tequila, and a loaded .45-caliber handgun. Pet.

App. A2, at 2; Suppression Hr'g Tr. 92. Petitioner was arrested for drunk driving and for possessing the weapon, see Pet. App. A2, at 2, and eventually was charged with one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2), Indictment 1.

2. The district court denied petitioner's motion to suppress the handgun. Pet. App. A2, at 2; Suppression Hr'g Tr. 90-94. The court first explained that the initial traffic stop was lawful because the tinted windows violated Michigan law. See Suppression Hr'g Tr. 90. The court then determined that the warrantless search of petitioner's car was permissible under either of two exceptions to the Fourth Amendment's warrant requirement. See id. at 91-93. First, the court explained that the search was a valid search incident to arrest because police had reason to believe that petitioner's car contained additional evidence relevant to the crime of arrest -- namely, more containers of alcohol. Id. at 91-92 (citing Davis v. United States, 564 U.S. 229, 235 (2011)). Second, the court explained that the automobile exception to the warrant requirement independently justified the search because the officers had probable cause to believe that petitioner's car contained evidence of criminal activity. Id. at 92 (citing California v. Acevedo, 500 U.S. 565 (1991)).

Petitioner pleaded guilty, reserving the right to challenge the denial of his suppression motion. Pet. App. A2, at 2. The district court sentenced petitioner to 60 months of imprisonment,

to be followed by three years of supervised release. Id. at 3; Judgment 2-3.

3. The court of appeals affirmed in an unpublished opinion, finding that the search was a lawful search incident to arrest. Pet. App. A2, at 3-5. As relevant here, petitioner argued that the search was invalid because "(1) there was no reason for officers to believe they would find more evidence in the car, and (2) [petitioner] was not formally under arrest at the time of the search." Id. at 4. The court rejected the first argument, explaining that once petitioner handed officers "a cold, half-full beer," it "was reasonable for officers to believe that the car could contain additional open containers of alcohol or other sources of intoxication, which would be relevant to the original [drunk-driving] crime of arrest." Ibid. The court also rejected the second argument, explaining that even if petitioner had not yet been formally arrested at the time of the search, "a formal custodial arrest need not precede the search as long as the formal arrest follows 'quickly on the heels of the challenged search' and 'the fruits of that search are not necessary to sustain probable cause to arrest.'" Id. at 4-5 (citations omitted). The court did not address the district court's independent determination that the search also was permissible under the automobile exception to the warrant requirement.

ARGUMENT

Petitioner renews his contention (Pet. 2-4) that the search of his car was not a valid search incident to arrest because officers conducted it before formally arresting him. The court of appeals correctly rejected that contention, petitioner does not contend that the decision below conflicts with any decision of this Court or another court of appeals, and in any event this case would be an unsuitable vehicle for further review. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly determined that the search of petitioner's car was a lawful search incident to arrest, even if petitioner had not yet been formally arrested. Although law enforcement generally may not search a vehicle without first obtaining a warrant, there are several "specifically established and well-delineated exceptions" to that rule. Arizona v. Gant, 556 U.S. 332, 338 (2009) (citation omitted). One such exception is the search-incident-to-arrest doctrine, which as relevant here authorizes officers to search the passenger compartment of a vehicle "incident to a recent occupant's arrest" if (1) "the arrestee is within reaching distance of the passenger compartment at the time of the search" or (2) "it is reasonable to believe the vehicle contains evidence of the offense of arrest." Id. at 351.

Petitioner does not challenge the court of appeals' finding that, at the time his car was searched, it was reasonable for officers to believe that the car would contain evidence of the

offense of arrest -- namely, additional containers of alcohol. See Pet. App. A2, at 4. Instead, petitioner contends (Pet. 2-4) that the officers were required formally to state, as he sat handcuffed in the patrol car, that he was under arrest before conducting a search incident to arrest under Gant.

As petitioner acknowledges (Pet. 2), however, that contention is foreclosed by this Court's decision in Rawlings v. Kentucky, 448 U.S. 98 (1980). There, after a suspect admitted to police that various controlled substances belonged to him, an officer first "searched [the suspect's] person and found $4,500 in cash in [his] shirt pocket and a knife in a sheath at [his] side," and only "then placed [the suspect] under formal arrest." Id. at 101. This Court found that search to be lawful. The Court observed that "[o]nce [the suspect] admitted ownership of [a] sizable quantity of drugs," "the police clearly had probable cause to place [him] under arrest." Id. at 111. The Court further observed that "[t]he fruits of the search of [the suspect's] person were, of course, not necessary to support probable cause to arrest [him]." Id. at 111 n.6; see Sibron v. New York, 392 U.S. 40, 63 (1968) ("[A]n incident search may not precede an arrest and serve as part of its justification."). Accordingly, this Court in Rawlings had "no difficulty upholding this search as incident to [the suspect's] formal arrest." 448 U.S. at 111. As the Court explained, "[w]here the formal arrest followed quickly on the heels of the challenged search of [the suspect's] person," it was not "particularly

important that the search preceded the arrest rather than vice versa." Ibid.

Under Rawlings, therefore, police may conduct a search incident to arrest before making a formal arrest when they (1) have probable cause to make the arrest; (2) do not use the fruits of that search to establish the requisite probable cause; and (3) make the arrest shortly after the search. 448 U.S. at 111. That rule is eminently sensible. Courts are rightly "reluctant to micromanage the precise order in which officers who have probable cause to arrest conduct searches and arrests," especially "given the safety and other tactical considerations that can be involved." United States v. Lewis, 147 A.3d 236, 240 (D.C. 2016) (en banc).

The search here was accordingly valid. Petitioner does not dispute that, at the time his car was searched, officers had probable cause to arrest him for violating laws prohibiting the possession of an open container of alcohol in a moving vehicle, see Mich. Comp. Laws Ann. § 257.624a(1) (West Supp. 2016), and operating a vehicle under the influence of alcohol, see id. § 257.625(1). Indeed, they already had taken all of the informal steps to do so. Nor does he dispute that his formal arrest "followed quickly on the heels of the challenged search." Rawlings, 448 U.S. at 111. Accordingly, the search did not violate the Fourth Amendment merely because it preceded petitioner's

formal arrest. See, e.g., United States v. Powell, 483 F.3d 836, 838-842 (D.C. Cir.) (en banc), cert. denied, 552 U.S. 1043 (2007).

Petitioner's reliance (Pet. 3) on Knowles v. Iowa, 525 U.S. 113 (1998), is misplaced. There, after stopping the defendant for speeding, the officer chose to issue a citation rather than make an arrest, even though he could have arrested the motorist under Iowa law. Id. at 114. Having already decided not to make an arrest, the officer nevertheless searched the defendant's car, eventually finding marijuana. Ibid. This Court declined to extend the search-incident-to-arrest doctrine to encompass such a "search incident to citation," id. at 115, holding that the officer-safety and evidence-preservation justifications for the former are inapplicable when an officer pulls over a motorist for speeding and decides to issue a citation rather than make an arrest. See id. at 117-118. As the Court explained, "[o]nce Knowles was stopped for speeding and issued a citation, all the evidence necessary to prosecute that offense had been obtained" and "[n]o further evidence of excessive speed was going to be found either on the person of the offender or in the passenger compartment of the car." Id. at 118. Here, by contrast, further evidence of petitioner's intoxication was likely to be found in his car; petitioner does not dispute that "it [wa]s reasonable to believe the vehicle contain[ed] evidence of the offense of arrest," Gant, 556 U.S. at 351, which was sufficient to justify the search here.

2. Petitioner does not contend that the decision below conflicts with any decision of this Court or another court of appeals. To the contrary, every federal court of appeals that has considered the issue has recognized that under this Court's decision in Rawlings, "the police may search a suspect whom they have probable cause to arrest if the 'formal arrest follows quickly on the heels of the challenged search.'" Powell, 483 F.3d at 838 (brackets and citation omitted); see, e.g., United States v. Bizier, 111 F.3d 214, 217 (1st Cir. 1997); United States v. Patiutka, 804 F.3d 684, 688 (4th Cir. 2015); United States v. Hernandez, 825 F.2d 846, 852 (5th Cir. 1987), cert. denied, 484 U.S. 1068 (1988); United States v. McCraney, 674 F.3d 614, 619 (6th Cir. 2012); United States v. Leo, 792 F.3d 742, 748 n.1 (7th Cir. 2015); United States v. Chartier, 772 F.3d 539, 546 (8th Cir. 2014); United States v. Torres-Castro, 470 F.3d 992, 997 (10th Cir. 2006), cert. denied, 550 U.S. 949 (2007); United States v. Banshee, 91 F.3d 99, 102 (11th Cir. 1996), cert. denied, 519 U.S. 1083 (1997).

Against that consensus in the federal courts of appeals, the New York Court of Appeals has held that a search incident to arrest is invalid if it precedes the arrest and the searching officer did not intend to arrest the defendant at the time of the search. See People v. Reid, 26 N.E.3d 237 (2014). For the reasons stated in the government's opposition to the petition for a writ of certiorari in Diaz v. United States, cert. denied, 138 S. Ct. 981

(2018) (No. 17-6606), a copy of which the government has provided to petitioner, that shallow conflict does not warrant this Court's intervention. See Br. in Opp. at 19-23, Diaz, supra (No. 17-6606). After denying the petition in Diaz, this Court has continued to deny petitions for writs of certiorari raising the same or similar issues, e.g., Dupree v. United States, 2019 WL 5686520 (Nov. 4, 2019) (No. 19-5343); McIlwain v. United States, 2019 WL 4921943 (Oct. 7, 2019) (No. 18-9393), as it long has done, e.g., Heaven v. Colorado, 137 S. Ct. 2297 (2017) (No. 16-1225); Powell v. United States, 552 U.S. 1043 (2007) (No. 07-5333).* The same result is warranted here.

3. Even if the question presented warranted this Court's review, this case would be a poor vehicle in which to address it. As the district court explained, the search of petitioner's car independently was lawful under the automobile exception to the warrant requirement. Suppression Hr'g Tr. 92-93. Under that exception, "[i]f there is probable cause to believe a vehicle contains evidence of criminal activity," police may search "any area of the vehicle in which the evidence might be found." Gant, 556 U.S. at 347 (citing United States v. Ross, 456 U.S. 798, 820-821 (1982)).

Applying that exception here, the district court correctly determined that the officers -- having just been handed a cold,

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* Another pending petition raises similar issues. See Lam v. United States, No. 19-5582 (filed Aug. 9, 2019).

half-full can of beer and having spotted what appeared to be another can in the car -- had probable cause to believe that the car contained additional open containers of alcohol, which are prohibited under Michigan law. Suppression Hr'g Tr. 93 (citing United States v. Black, 240 Fed. Appx. 95, 102 (6th Cir. 2007), cert. denied, 552 U.S. 1129 (2008)); see, e.g., United States v. McGuire, 957 F.2d 310, 314 (7th Cir. 1992) ("Once Trooper Newman discovered that McGuire was transporting open, alcoholic liquor in violation of Illinois law, he had probable cause to believe that the car contained additional contraband or evidence.") (citation omitted). Accordingly, even if the search were not a valid search incident to arrest, it still would be lawful under the automobile exception to the Fourth Amendment's warrant requirement. Petitioner therefore would not be entitled to relief even if he were to prevail on the question presented here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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