

**IN THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
LAKE COUNTY, OHIO**

STATE OF OHIO,	:	<b>O P I N I O N</b>
Plaintiff-Appellee,	:	
- vs -	:	<b>CASE NO. 2010-L-139</b>
KENNETH L. HOBBS,	:	
Defendant-Appellant.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 08 CR 000001.

Judgment: Affirmed.

*Charles E. Coulson*, Lake County Prosecutor, and *Teri R. Daniel*, Assistant Prosecutor, 105 Main Street, P. O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

*Kenneth L. Hobbs*, pro se, PID: 553-935, 1710 Prospect Avenue, Cleveland, OH 44115 (Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Kenneth L. Hobbs appeals from a judgment of the Lake County Court of Common Pleas Court which denied his petition for postconviction relief. We affirm the trial court because Mr. Hobbs' claim is barred by the doctrine of res judicata.

{¶2} This is the third time Mr. Hobbs is before this court regarding his convictions of having weapons while under a disability, carrying concealed weapons, and improperly handling firearms in a motor vehicle with a firearm specification.

{¶3} The police stopped Mr. Hobbs' vehicle after an officer ran a computer check and found an outstanding warrant for his arrest. When the police searched his vehicle prior to its impoundment, they found a loaded gun in the center console. At the suppression hearing, the defense focused on the propriety of the traffic stop without challenging the propriety of the officers' search of the vehicle.

{¶4} **Hobbs I**

{¶5} Mr. Hobbs appealed his convictions to this court, claiming that the search of his vehicle was unlawful as an inventory search. We affirmed the trial court, in *State v. Hobbs*, 11th Dist. No. 2008-L-155, 2010-Ohio-589 ("*Hobbs I*"). We determined that Mr. Hobbs waived the search issue by not challenging it at the suppression hearing. We noted, however, that the record reflected the search of Mr. Hobbs' vehicle appeared to be a routine inventory search of an impounded vehicle, which is a well-recognized exception to the warrant requirement. We remarked that, although the state did not present its standardized policy and procedures to show that the police department conducted the inventory search pursuant to its guidelines, Mr. Hobbs had waived the issue of the propriety of the inventory search by choosing not to challenge it at the suppression hearing.

{¶6} Through a footnote in our decision we observed that the search of the vehicle *could* also be characterized as a search incident to arrest, another exception to the warrant requirement. However, as we further noted, although Ohio law currently allows an officer to search the passenger compartment of a vehicle as a contemporaneous incident of an arrest after the officer has made a lawful custodial arrest of the occupant of a vehicle, the United States Supreme Court, in *Arizona v. Gant*

(2009), 556 U.S. 332, recently held that police may search a vehicle incident to an occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or if it is reasonable to believe the vehicle contains evidence of the offense of arrest. *Hobbs*, supra, at fn. 1.

{¶7} Mr. Hobbs filed a motion for a reconsideration of our decision, which we denied because he failed to raise issues not already considered in our decision. We stressed that *Gant* did not affect the outcome of his appeal because Mr. Hobbs did not contest the legality of the search as a lawful inventory search and the record does not suggest otherwise. He appealed our decision to the Supreme Court of Ohio, and the court denied the appeal in *State v. Hobbs*, 125 Ohio St.3d 1464, 2010-Ohio-2753.

{¶8} **Hobbs II**

{¶9} After his direct appeal, Mr. Hobbs successfully moved the trial court for a new sentencing hearing because it had erroneously applied a one-year gun specification to the count of improper handling of a firearm in a motor vehicle, rendering the sentence voidable. Before the new sentencing hearing, Mr. Hobbs filed several motions, one of which asked the court to reopen his suppression hearing under *Gant*. The court denied this motion. The court then resentenced him for offenses without the firearm specification.

{¶10} Mr. Hobbs appealed, claiming the trial court should have reopened his suppression hearing because of the *Gant* decision. We affirmed the trial court, explaining again that *Gant* would not affect the outcome of this case, because, regardless of the legality of the instant search as a search incident to arrest, he waived the issue of the lawfulness of the police's search of his vehicle as a an inventory search

by not contesting it at the suppression hearing. *State v. Hobbs*, 11th Dist. No. 2010-L-064, 2011-Ohio-1298 (“*Hobbs II*”).

**{¶11} The Instant Postconviction Relief Petition**

{¶12} While his second appeal was pending, Mr. Hobbs filed this postconviction relief petition pro se, claiming, yet again, that the search of his vehicle was improper as a search incident to arrest pursuant to *Gant*, and improper as an inventory search. The trial court denied his petition, finding his claim barred by the doctrine of res judicata. Mr. Hobbs filed the instant appeal. His assignment of error states:

{¶13} “The trial court comitted [sic] prejudicial error when it failed to review appellant[']s motion for Post conviction [relief] [pursuant to] R.C. 2953.23(A)(1) pertaining to a New United States Supreme Court ruling Arivona [sic] V Gant (2009) 129 S.ct 1710, without establishing the proper steps for substantive grounds for relief.”

{¶14} We review a trial court’s decision on a petition for postconviction relief for abuse of discretion. An abuse of discretion is the trial court’s “failure to exercise sound, reasonable, and legal decision-making.” *State v. Gondor*, 112 Ohio St. 3d 377, 2006-Ohio-6679. *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, ¶62, quoting Black’s Law Dictionary (8 Ed.Rev.2004) 11. In postconviction cases, “the trial court’s gatekeeping function in the postconviction process is entitled to deference.” *Id.* at ¶51.

{¶15} R.C. 2953.21 provides, in relevant part:

{¶16} “(A)(1)(a) Any person who has been convicted of a criminal offense \*\*\* and who claims that there was such a denial or infringement of the person’s rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, \*\*\* may file a petition in the court that imposed sentence, stating the

grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.”

{¶17} A petition for postconviction relief does not provide a petitioner a second opportunity to litigate his or her conviction. *State v. Hessler*, 10th Dist. No. 01AP-1011, 2002-Ohio-3321, ¶23. Pursuant to the doctrine of res judicata, “a final judgment of conviction bars the convicted defendant from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial which resulted in that judgment of conviction or on an appeal from that judgment.” *State v. D'Ambrosio*, (1995) 73 Ohio St. 3d 141, 143, quoting *State v. Perry* (1967), 10 Ohio St.2d 175, 180.

{¶18} To avoid dismissal of a postconviction petition on res judicata grounds, appellant must present competent, relevant, and material evidence outside of the trial court's record in support of his claim. *State v. Adams*, 11th Dist. No. 2003-T-0064, 2005-Ohio-348, ¶39, citing *State v. Cole* (1982), 2 Ohio St.3d 112.

{¶19} In the instant postconviction relief petition, Mr. Hobbs did not present any evidence dehors the record; instead, he merely attempted to relitigate the search issue based on *Gant*. Mr. Hobbs raised this issue in *Hobbs II* as an assignment of error, and we have already fully addressed it. The doctrine of res judicata bars the relitigation of this issue in his postconviction relief petition.

{¶20} Mr. Hobbs cites *State v. Gilbert*, 184 Ohio App.3d 642, 2009-Ohio-5528, to support his claim that he should be allowed to litigate the search issue now because he did not have a prior opportunity to do so. *Gilbert* in no way supports his claim. In

that case, the defendant did not challenge the legitimacy of the search of his vehicle at trial or in his appellate brief pursuant to *Gant*, because *Gant* was released after he filed his appellate brief. The Second District determined that it could consider *Gant*'s implication on the case, citing *Griffith v. Kentucky* (1987), 479 U.S. 314, which held that new rules for the conduct of criminal prosecutions must be "applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Gilbert* at ¶18, quoting *Griffith* at 328. Because the Second District believed *Gant* did formulate a new rule in the area of Fourth Amendment searches, it felt necessary to consider the application of *Gant* on appeal.

{¶21} Consistent with *Gilbert*, this court addressed the implication of *Gant* in *Hobbs I*. We note that although the search in Mr. Hobbs' case *could* be characterized as a search incident to arrest, the lawfulness of which may be called into doubt by *Gant*, *Gant* does not control the outcome of this case because the record indicates the search was a routine inventory search, the lawfulness of which he did not contest and thus waived. We reiterated this when Mr. Hobbs raised the *Gant* issue in *Hobbs II*.

{¶22} Mr. Hobbs' claim in this postconviction relief is barred by the doctrine of res judicata. The assignment of error is without merit.

{¶23} Judgment of the Lake County Court of Common Pleas Court affirmed.

DIANE V. GRENDALL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.