Law Enforcement Warrantless Searches Of Cellular Telephones - Ensuring Fourth Amendment Protection

Part I

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Part I – This Issue

- Introduction
- Reasonable Expectation of Privacy
- Search Incident to Arrest
- Automobile Exception

Introduction

Over the last decade, we have seen the general public's use of cell phones explode. In fact, in this day and age, it is unlikely to come across an individual who does not carry a cell phone on his or her person at all times. Cell phones, however, are no longer used for simply making and receiving telephone calls or numbers, like the simple flip phones of years past. As such, Law Enforcement has seen an incredible increase in taking custody of subjects with cell phones in their possession, and the need to examine technology during the course of a criminal investigation. The newer generation cell phones allow individuals to carry incredible amounts of information in their phones, including financial records, medical records, closed circuit television, pictures, documents, music, text messages, and emails. In fact, cell phones have now replaced many of the tangible items individuals used to carry that officers could search without question, such as address books, pocket books, wallets, and photographs.

The very fact that cell phones are carried in public and hold enormous amounts of data has extended the search capabilities of law enforcement officers. Technology, however, is evolving at light speed – faster than the current law and Court rulings can keep up. In 2009, the Supreme Court ruled on the expectation of privacy in an alphanumeric pager, and in 2012, the Supreme Court examined the use of GPS devices by police. When did we last use alphanumeric pagers and how long have we been using GPS devices? Like many of the new toys we use and purchase in Law Enforcement, it may take years to have legal guidance on whether we are handling them correctly. As you can image this is very frustrating for a legal advisor and trainer. While the data contained on a cell phone may hold great value to law enforcement, the question becomes: Do cellular telephones have an increased expectation of privacy and under what circumstances can Law Enforcement legally seize and search a cellular telephone? The strength of your criminal cases depends on the proper interpretation of Fourth Amendment rules. This two part article will examine the current law across the country to provide some operational guidance.

Reasonable Expectation of Privacy

The Fourth Amendment of the United States Constitution protects individuals against certain kinds of governmental intrusions, including the right to be free from unreasonable searches and seizures. Warrantless searches are "per se unreasonable," subject only to a few specifically established and well-delineated exceptions."[1] In *Chimmel v. California*,[2] the Supreme Court found that the exception for a search incident to a lawful arrest allows the officer to search the person arrested to remove any weapons that could be used to resist arrest, assist in an escape, or endanger the officer's safety. The Court's decision also included, as a basis for a warrantless search, the concealment or destruction of evidence. This exception, however, applies only to "the area from within which [an arrestee] might gain possession of a weapon or destructible evidence."[3]

In 1973, the United States Supreme Court expanded the scope of an officer's ability to conduct a search incident to arrest by holding that officers may open and search through all items on an arrestee's person, even if they are in a closed container.[4] In *New York v. Belton*,[5] the Court applied this exception to the automobile context and found that articles inside a vehicle's passenger area are "generally . . . within the area in which an arrestee might reach."[6] The finding permits officers, following a lawful arrest, to search the entire passenger compartment of a vehicle, including any container whether it be open or closed. The *Belton* decision, however, should be read to authorize police officers to search a vehicle incident to arrest only when the arrestee is unsecured and can access the passenger compartment.

Arizona v. Gant narrowed the rule for searching the interior of vehicles by holding that law enforcement officers may search a vehicle incident to arrest "only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest."[7] The Court stated that "when these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies."[8]

In recent years, law enforcement officers have applied the search incident to arrest doctrine to the search of cell phones. Under this theory, an officer may conduct a warrantless search of items found on the arrestee following any custodial arrest, such as a pocketbook, wallet, etc. Officers utilize this doctrine under the theory that the cell phone is found on the person during the custodial search. As such, courts have been called upon to apply this doctrine to digital devices. Problems arise, however, because courts in different jurisdictions disagree as to whether a cell phone may be considered an item "of the person" or "container" and therefore, subject to a warrantless search, or whether a cell phone is a "possession," subject to a higher expectation of privacy. In other words, is the search of a cell phone a search of the "person" or a search of "possessions?" As of yet, our Supreme Court has not settled the disagreement among the various courts and jurisdictions.

Search Incident to Arrest

In *U.S. v. Finley,*[9] the defendant was stopped by police followed a controlled narcotics purchase. At the time of the stop the defendant had his cell phone in his pocket. The officers seized and searched the defendant's cell phone and found evidence of the defendant's narcotic use and trafficking. At trial, the defendant moved to suppress all evidence from his cell phone on the grounds that the warrantless search of the phone violated

his Fourth Amendment rights. The district court denied defendant's motion. The Fifth Circuit Court of Appeals upheld the ruling and found that a cell phone is a "container" and therefore, text messages and call records could be retrieved from a warrantless search conducted under the search incident to a custodial arrest exception to the warrant requirement. The court reasoned that case law is clear that officers are "not constrained to search only for weapons or instruments of escape on the arrestee's person; they may also, without any additional justification, look for evidence of the arrestee's crime on his person in order to preserve it for use at trial. . . . The permissible scope of a search incident to a lawful arrest extends to containers found on the arrestee's person."[10]

The California Supreme Court's recent decision in *People v. Diaz*[11] also supports the camp that finds a cell phone is merely a container and subject to a search incident to arrest. Under facts similar to *Finley*, the *Diaz* court found that a cell phone was personal property immediately associated with a person, like a cigarette package found in a pocket, and therefore a warrantless search of the cell phone was valid. The court reasoned that a cell phone acts as a "case" or "closed container" of personal effects and is therefore subject to a search incident to arrest. The court refused to make a distinction between a cell phone and another type of "container" by stating that "[t]he scope of a warrantless search of an automobile thus is not defined by the nature of the container in which the contraband is secreted."[12]

Other courts, however, have strongly disagreed with the "container" analogy relied upon in other jurisdictions by pointing to the vast amount of data and nature of information stored on the device, the fact that you cannot access the contents of the cell phone by merely "opening" it, and the device's inability to hold tangible objects.

In *State v. Smith*,[13] the Ohio Supreme Court refused to accept the analogy that cell phones are just like any other container for purposes of a Fourth Amendment analysis and stated that cases following this proposition "[fail] to consider the Supreme Court's definition of "container" in *Belton,* which implies that the container must actually have a physical object within it. Additionally, the pagers and computer memo books of the early and mid-1990s bear little resemblance to the cell phones of today. Even the more basic models of modern cell phones are capable of storing a wealth of digitized information wholly unlike any physical object found within a closed container." The court reasoned that "given their unique nature as multifunctional tools, cell phones defy easy categorization. On one hand, they contain digital address books very much akin to traditional address books carried on the person, which are entitled to a lower expectation of privacy in a search incident to an arrest. On the other hand, they have the ability to transmit large amounts of data in various forms, likening them to laptop computers, which are entitled to a higher expectation of privacy."[14] The court found that once officers have a cell phone in their possession, they have "satisfied [the department's] immediate interest in collecting and preserving evidence and can take preventive steps to ensure that the data found on the phone are neither lost nor erased." The court held that because of a person's high expectation of privacy in the contents of one's cell phone, officers must obtain a warrant before searching the phone's contents.

Automobile Exception

Under the "automobile exception" to the Fourth Amendment warrant requirement, law enforcement officers may conduct a warrantless search of the passenger compartment of a motor vehicle, including containers therein, if the officer has probable cause to believe the vehicle contains contraband or other evidence of a crime. This exception to the warrant requirement is one area that courts seem to agree when analyzing whether the search of the cell phone was lawful under the Fourth Amendment.

For example, in *State v. Boyd,*[15] the Connecticut Supreme Court found that the officers had probable cause to seize and search the contents of the defendant's cell phone under the automobile exception to the warrant requirement since, although the defendant had a legitimate expectation of privacy in his cell phone, the police had probable cause to believe that the defendant was selling drugs, a cell phone was visible on the front seat of the defendant's car when the police arrested him, and the police reasonably believed that the cell phone contained evidence of drug activity.[16]

Part II will focus on searches related to Contemporaneousness, Booking, Consent, and Stolen/ Abandoned Devices.

[1] *Katz v. United States*, 389 U.S. 347, 357 (1967.)
[2] 395 U.S. 752 (1969.)
[3] *Id.* at 763.
[4] *United States v. Robinson*, 414 U.S. 218 (1973.)
[5] *New York v. Belton*, 453 U.S. 454, 460 (1981.)
[6] *Id.* at 460.
[7] 556 U.S. 332, 351 (2009.)
[8] *Id.*
[9] 477 F.3d 250 (5th Cir. 2007.)
[10] *Id.* at 259.
[11] 244 P.3d 501 (Cal. 2011.)
[12] *Id.* at 507 (internal quotations omitted.)
[13] 920 N.E.2d 949 (Ohio 2009.)
[14] *Id.* at 955.
[15] 295 Conn. 707 (2010.)
[16] *See*, *e.g.*, *United States v. James*, 2008 WL 1925032, *3–9 (E.D.Mo. Apr. 29, 2008) ("because probable cause existed to believe that evidence of a crime would be found in the cell phone call records and address book, the automobile exception allows the search of the cell phone just as it allows a search of other closed containers found in the vehicle"); *United States v. Fierros–Alvarez*, 547 F.Supp.2d 1206 (D.Kan.2008) (automobile exception justified search of cell phone found in vehicle); *Quinonez v. State*, 2012 WL 2149410, *2 (Tex. App. – Dallas, 2012)(same); *United States v. Wurie*, 612 F.Supp.2d 104, 109 (D.Mass.2009) ("decisions of district courts and Courts of Appeals (often analogizing cell phones to the earlier pager technology) trend heavily in favor of finding that the search incident to arrest or [automobile] exceptions apply to searches of the contents of cell phones."); *United States v. Cole*, 2010 WL 3210963, *17 (N.D.Ga. Aug. 11, 2010)(same.)