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

Part II

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Part II – This Issue

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This is a two-part article. Part I can be accessed here

In the first part of this article, we identified the necessity to understand the expectation of privacy standards applicable to the search and seizure of a personally owned cellular telephone. Part I reviewed warrantless exceptions of seizing and searching cellular telephones to include Search Incident to Arrest and the Automobile Exception. This article will address the remaining topics including: Contemporaneous searches, Booking, Consent and Stolen or Abandoned Devices.

Contemporaneousness

Our research found that some jurisdictions also look to the contemporaneousness of the search when determining whether a warrantless search of a cell phone was valid. Those courts that look at the length of time between the arrest and the search of a cell phone differ as to the acceptable length of time.

In *Commonwealth v. Diaz*,[1] the defendant was arrested for operating a vehicle without a license and a search of the vehicle revealed baggies of heroine. When the defendant was taken to the station his cell phone and other items were seized pursuant to a routine inventory search. While at the station his cell phone repeatedly rang and eventually an officer answered the phone and heard the caller attempt to purchase drugs. At trial, the court granted the defendant's motion to suppress evidence obtained from the warrantless search of the cell phone. The court relied in part on the fact that the officer answered the cell phone twenty minutes after the

arrest at the police station. Similarly, in *United States v. LaSalle,*[2] the district court for the ninth circuit held that the search of a cell phone, two hours after the initial arrest, was not contemporaneous with the arrest and suppressed all evidence obtained from the search. The Appellate Court in *State v. Nix*,[3] however, found that the search of the defendant's cell phone forty minutes following his arrest was reasonable for purposes of the search incident to arrest exception to the warrant requirement when the delay was caused by the officer waiting to have an individual who could expertly search the phone and protect against any inadvertent destruction of evidence.

Booking

The issue of warrantless searches of cell phones also arises during the booking or inventory search process. In *United States v. Park*,[4] the court granted defendant's motion to suppress evidence obtained from the search of a cell phone during the station house booking process. The court held that due to the quantity and quality of information that can be stored on a cellular phone, a cellular phone should not be characterized as an element of individual's clothing or person, but rather as a "possession[ ] within an arrestee's immediate control [that has] fourth amendment protection at the station house."[5] The Court stated that "an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence."[6] The court further stated that the purpose of a booking search is to create an inventory of an arrestee's belongings and that the officers could achieve this purpose by simply listing the cell phone on the booking form. The court further stated that unlike other "closed containers," such as purses or bags which might contain contraband or weapons, there is no possibility that a cell phone will contain any dangerous instrumentalities."[7]

Likewise, in *United States v. Wall*,[8] the court granted defendant's motion to suppress evidence obtained from the cell phone where the DEA agent searched the defendant's cell phone during the booking process and the search could not be justified as a search incident to arrest, was not contemporaneous to the arrest, and was not based on the need to preserve evidence.

Consent

Generally, courts allow a search of a cell phone when the defendant consents to the search. In *United States v. Morel*,[9] the court denied defendant's motion to suppress evidence obtained from a search of his cell phone. In *Morel*, the special agents executed a "consent to search" form and informed the defendant of his rights. The court stated that the agent "credibly testified that he advised defendant of his rights and [. . .], the totality of the circumstances indicate that defendant understood and knowingly and voluntarily waived his rights"[10] and denied the defendant's motion.

In *United States v. Stapleton*,[11] the defendant was a passenger in a vehicle that was pulled over for speeding, but who was also suspected to be involved in drug trafficking. The owner and driver of the vehicle gave her consent for officers to search the vehicle. The officers searched the vehicle, including a cell phone that was owned by the defendant passenger. On appeal, the defendant claimed that evidence obtained from the cell phone should have been suppressed on the ground that the search exceeded the scope of consent, and that officers should have obtained his consent to search the phone as it was his property. The appellate court affirmed the lower court's conviction and stated that the defendant "remained silent when told of the search

and the object of the search, and he did not indicate that the telephone was his property and that the patrolmen did not have his permission to search it. Given [the defendant's] silence in such circumstances, it was objectively reasonable for the patrolmen to conclude either that they had all the consent that was constitutionally required [from the owner of the vehicle], or that they [had defendant's] implied consent."[12]

In *United States v. Zavala*,[13] however, the appellate court found that DEA agents' search of the defendant's cell phone exceeded the scope of the defendant's consent to search his vehicle. The court found that because the officers initially stopped the defendant's vehicle on reasonable suspicion alone, they were not permitted to search the vehicle absent defendant's consent. The court further found that while the defendant consented to the search of his vehicle, it did not extend to his cell phones given that the phones were immediately removed from his person and placed on the roof of the vehicle, and therefore, it was not objectively reasonable to understand his consent to search the car as consent to search the phones.

Stolen/Abandoned Device

Courts generally find that defendants have no reasonable expectation of privacy in abandoned cell phones. In *United States v. Hanner*,[14] the district court denied defendant's motion to suppress evidence obtained from his cell phone on the grounds that defendant abandoned his cell phone in the alley near a murder scene. Likewise, in *United States v. Foster*,[15] the court found that when the defendant fled from officers during a traffic stop, he abandoned his vehicle and therefore, forfeited any reasonable expectation of privacy he may have had in the contents of the vehicle, including his cell phone. Similarly, in *State v. Dailey*,[16] the court found that the defendant voluntarily abandoned his cell phone when he slipped out of his coat and left it and its contents behind in an attempt to escape security.

Conclusion

What is most obvious after a reading of the above cases is that the United States Supreme Court will need to resolve the inconsistencies among the various districts and provide clear guidance or clear cut standards regarding an officer's ability to conduct a warrantless search of an individual's cell phone. It is not surprising, however, that given the extraordinary communication and information sharing capabilities that cell phones have become a useful, if not necessary, tool of the trade for criminals, particularly for those involved in the drug trade. Likewise, because of the cell phones capability to access such a vast amount of information regarding an individual's activities – from communications to photographs to financial transactions – it is also no surprise that this information has great evidentiary value to law enforcement.

The key, however, is to avoid the pitfalls of an invalid warrantless search and the inevitable suppression of the valuable information that may result. How can departments and officers avoid such pitfalls? First and foremost is to have knowledge and understanding of the ever-evolving search and seizure laws. As department administration can see, however, the standard of a particular search and seizure rule – or exception to the warrant requirement – may very well depend on the jurisdiction in which the department operates. With this in mind, department administrators would be wise to seek the advice of outside counsel or district attorney regarding the applicable search and seizure laws in their particular region. Once this information is obtained, it is important for departments to create comprehensive policies that cover all aspects of a valid

search and seizure, including those instances in which a cell phone is involved. Furthermore, it is imperative that officers receive thorough training on these policies – from basic 4th Amendment principles to the more in-depth topic of search and seizure and the exceptions to the warrant requirement. As a general overall rule, we are advising officers that once the cellular telephone is secured in police custody to strongly consider a search warrant for authority to search the phone for information. This may mean placing the phone in a bag or evidence container that prohibits cellular transmission or deletion of information.. Departments should consider obtaining these bags so that while officers are determining how to proceed information is not lost or removed from the phone. We expect that until the United States Supreme Court issues rulings on these matters, lower court rulings will continue to be different between jurisdictions. Until the Supreme Court settles the inconsistencies and provides clear cut standards, however, we are dedicated to keep you updated on this challenging topic.

[1] 2009 WL 2963693 (Mass. Super. Ct. Sept. 3, 2009.)
[2] 2007 WL 1390820 (D. Hawaii May 9, 2007.)
[3] 237 P.3d 842 (2010.)
[4] No. CR 05-375 SI, 2007 WL 1521573 (N.D. Cal. May 23, 2007)(same.)
[5] *Id.* at *8.
[6] *Id.* at *10 (citing *Florida v. Wells*, 495 U.S. 1, 4, (1990); *see also United States v. Feldman*, 788 F.2d 544, 553 (9th Cir.1986) ("An inventory search will not be sustained where the court believed that the officers were searching for incriminating evidence of other offenses.").
[7] *Id.* at *11.
[8] 2008 WL 5381412 (S.D. Fla. 2008.)
[9] 2010 WL 2545479 (E.D.N.Y. 2010.)
[10] *Id.* at *13.
[11] 10 F.3d 582 (8th Cir. 1993.)
[12] *Id.* at 584.
[13] 541 F.3d 562 (5th Cir. 2008.)
[14] 2007 WL 1437436 (W.D.Pa. 2007.)
[15] 65 Fed. Appx. 41 (6th Cir. 2003.)
[16] 2010 WL 3836204 (Ohio Ct. App. 3d Dist. Logan County 2010.)