Courts Limit Cell Phone Searches Incident to Arrest

Description

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Four years ago, in *Arizona v. Gant*, 556 U.S. 332 (2009), the Supreme Court took a sharp turn in the law of search incident to arrest. The Court stepped back toward the two justifications for the search incident to arrest exception to the Fourth Amendment warrant requirement—preservation of evidence and officer safety—first definitively articulated in *Chimel v. California*, 395 U.S. 752 (1969). In *Arizona v. Gant*, the Court held that the warrant requirement exception could not justify a vehicle search once the arrested had been handcuffed and secured following an arrest for driving on a suspended license, evidence of which was not reasonably likely to be found in the car.

Two new court decisions portend application of the Gant narrow view of the search incident to arrest doctrine as courts restrict searches of arrestees' cell phones. The federal Court of Appeals for the First Circuit and the Florida Supreme Court both recently rejected prosecutor arguments that searches of cell phones could be justified by the owners' arrests. The reasoning of these cases suggests a future line of analysis for searches of cell phones, pagers, tablets, and wearable computers.

United States v. Wurie[1]

In *Wurie,* Officers saw a suspected drug transaction between Wurie and Wade. After stopping Wade and finding crack cocaine on him, officers arrested Wurie. As they dealt with Wurie at the police station, his cell phone continued to ring. A picture of a woman and child appeared on the screen as the phone rang. Officers accessed the call log to identify the incoming number and tracked the number back to a nearby apartment.

At the apartment, officers saw a woman who appeared to be the woman on the cell phone screen. They entered the apartment to secure it, pending obtaining a search warrant. Inside the apartment, the officers saw a child who appeared to be the one in the cell phone screen photo. The officers ultimately searched the apartment and found a large amount of crack cocaine, marijuana, cash and a gun. Wurie was convicted of drug charges and being a felon in possession of a firearm.

Florida v. Smallwood[2]

Smallwood, wearing a mask and gloves, jumped over the counter at a convenience store, flashed a gun and demanded money. After he escaped with approximately $15,000 in cash, the clerk called police. The clerk identified Smallwood by his nickname, telling the officers that Smallwood was a very frequent customer.

An officer searched Smallwood's phone at the time of the arrest. The phone had photos taken shortly after the time of the robbery. The photos depicted a gun sitting next to a stack of cash and Smallwood holding a large amount of cash fanned out.

Shifting trends

To date, most courts considering searches of cell phones incident to arrest have allowed them. For example:

• United States v. Flores-Lopez, 670 F.3d 803 (7th Cir. 2012) (warrantless search of phone—limited to revealing phone number—allowed following controlled drug buy).

• United States v. Murphy, 552 F.3d 405 (4th Cir. 2009) (search of cell phone following traffic stop arrest justified by need to preserve evidence).

• Silvan W. v. Briggs, 309 Fed. Appx. 216 (10th Cir. 2009) ("permissible scope of a search incident to arrest includes the contents of a cell phone found on the arrestee's person").

• United States v. Finley, 477 F.3d 250 (5th Cir. 2007) (search of cell phone for text messages allowed following arrest for drug sales).

• Commonwealth v. Phifer, 979 N.E.2d 210 (Mass. 2012) (search allowed upon probable cause to believe that phone contained evidence of crime for which suspect was arrested).

• Hawkins v. State, 723 S.E.2d 924 (Ga. 2012) (search of phone for text messages following controlled buy allowed on basis that messages could be easily deleted and reasonable belief that phone would contain evidence of drug sales).

• People v. Diaz, 244 P.3d 501 (Cal. 2011) (search of cell phone allowed following controlled drug buy and arrest, search justified by mere fact of arrest).

The appellate court decision in *United States v. Wurie* is not only the first federal appellate decision to require a warrant to search the arrestee's cell phone, but also the first to issue a blanket, bright line rule requiring a warrant for searches of cell phones. The *Wurie* court asserted that many Americans "store their most personal papers and effects in electronic format on a cell phone, carried on the person," suggesting a heightened expectation of privacy in the phone electronic data. The Florida court reached a similar conclusion, noting "the most private and secret personal information and data is contained in or accessed through small portable electronic devices and, indeed, many people now store documents on their equipment that also operates as a phone that, twenty years ago, were stored and located only in home offices, in safes, or on home computers." The decision in Smallwood has some precedent in an earlier Ohio decision in *State v. Smith*, 920 N.E.2d 949 (Ohio 2009) (search of cell phone not allowed because of a person's high expectation of privacy in phone contents).

Beginning with the *Chimel* decision, the Supreme Court has favored bright line rules for police officers conducting searches incident to arrest. That seems to be why the First Circuit appellate court penned a far-reaching decision rather than taking the measured approach favored by other appellate courts that decided the merits of each case involving a cell phone search on the basis of the unique facts of the particular case. The *Wurie* decision did not rule out the possibility that a warrantless cell phone search might be justified by the exigent circumstances exception to the Fourth Amendment warrant clause.

Justifications for search incident to arrest

In *Chimel v. California*[3], the Supreme Court held that an arresting officer may "search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction" and may

search “the area into which an arrestee might reach in order to grab a weapon or evidentiary items.” The two justifications articulated in *Chimel* were later relied upon to allow removal of an object not readily identifiable during a frisk and closer examination of the object in *United States v. Robinson*, 414 U.S. 218 (1973). An officer removed a cigarette pack from Robinson’s pocket, opened it and found several packets of heroin. Many of the courts that have allowed warrantless searches of cell phones incident to arrest have relied on cigarette pack search allowed by *United States v. Robinson*.

In *United States v. Edwards*, 415 U.S. 800 (1974), the Supreme Court upheld seizure incident to arrest of Edward’s clothing for paint chip analysis in an effort to tie him to a burglary scene. Several later cases demonstrated the Court’s broad application of the *Chimel* rationale until the *Gant* case four years ago. The *Wurie* and *Smallwood* courts each considered Gant and post-Gant developments in their path to invalidate the searches of each defendant’s cell phone.

In *Wurie*, the prosecution argued that the *Chimel* officer safety and evidence preservation rationale should make it reasonable to make a warrantless search of an arrestee’s cell phone, whether or not there was a reasonable belief that the phone could be used as a weapon or contained evidence of a crime. After all, if the officer in Robinson was justified in searching the inside of a cigarette pack, a very small container, why not a cell phone?

The *Wurie* decision recognized that “the Supreme Court has never found the constitutionality of a search of the person incident to arrest to turn on the kind of item seized or its capacity to store private information.” Notwithstanding, the court stated, “what distinguishes a warrantless search of the data within a modern cell phone from the inspection of an arrestee’s cigarette pack or the examination of his clothing is not just the nature of the item searched, but the nature and scope of the search itself.” The court considered the vast amount and scope of personal information that many persons store on their cell phones, observing that such information is far removed from the packets of heroin or relatively small amount of personal information that could be stored in the cigarette pack at issue in Robinson.

“When the Court decided Robinson in 1973 and United States v. Chadwick, 433 U.S. 1 (1977), any search of the person would almost certainly have been the type of self-limiting search that could be justified under Chimel.” The *Wurie* court opined that at the time of the Robinson and Chadwick decisions, the Supreme Court could not have imagined the vast scope or intimate nature of data that would be carried on a phone in modern times. The court further noted that the “data that is not immediately destructible and poses no threat to the arresting officers.” Removing the battery or placing the phone into a shielded container excludes the threat of remote wiping of the phone data.

Though the Florida court in Smallwood reached a similar conclusion in excluding the cell phone photos, that court particularly focused on the amount of private information frequently found on modern smart phones. The court expressly rejected the logic of other courts that have relied on United States v. Robinson, 414 U.S. 218 (1973). “We conclude that the electronic devices that operate as cell phones of today are materially distinguishable from the static, limited-capacity cigarette packet in Robinson, not only in the ability to hold, import, and export private information, but by the very personal and vast nature of the information that may be stored on them or accessed through the electronic devices. . . . The search of a static, non-interactive container, cannot be deemed analogous to the search of a modern electronic device cell phone.”

The Smallwood court also cited an example from *United States v. Flores-Lopez*, 670 F.3d 803 (7th Cir. 2012), that describes an iPhone app that allows users to view webcams placed inside their homes. The

Florida court opined that a search of a smart phone is more like a search of a home than the search of the cigarette pack allowed in Robinson. "Physically entering the arrestee's home office without a search warrant to look in his file cabinets or desk, or remotely accessing his bank accounts and medical records without a search warrant through an electronic cell phone, is essentially the same for many people in today's technologically advanced society. We refuse to authorize government intrusion into the most private and personal details of an arrestee's life without a search warrant simply because the cellular phone device which stores that information is small enough to be carried on one's person."

The Florida court interpreted the Supreme Court's Gant decision to mean that "once an arrestee is physically separated from an item or thing, and thereby separated from any possible weapon or destructible evidence, the dual rationales for this search exception no longer apply." Officers took Smallwood's phone from him upon arrest, so the court saw no possibility that Smallwood could use the device as a weapon, nor destroy any evidence that may have existed on the phone.

The dissents in the *Smallwood* and *Wurie* decisions would have stuck with the traditional analysis of Chimel and Robinson, finding that Gant did not limit the search incident to arrest doctrine so narrowly as to bar searches of arrestees' cell phones. The dissent also noted that the mere fact that smart phones store vast amounts of data does not automatically give that data special protection under the Fourth Amendment.

The United States Supreme Court has been asked—and thus far declined—to grant certiorari and consider the question of search of a cell phone incident to arrest. The blanket prohibition and the path taken by the First Circuit Court of Appeals, as well as the split of authority in the federal courts of appeals and a few state supreme courts, may tip the balance and prompt the Court to address the issue. In the meantime, officers should consult with local prosecutors and obtain guidance in advance of facing the issue. Officers should also become familiar with basic rules for protecting digital devices from remote wiping (and know that removing a battery is not always possible or advisable).

Daigle Law Group thanks Attorney Ken Wallentine for preparing this summary. Attorney Wallentine, a good friend of Daigle Law Group, LLC, is a public safety legal professional offering consultation and expert witness litigation support services. A veteran law enforcement administrator, risk manager, and former prosecutor and civil litigator, Ken Wallentine is licensed to practice law in the State of Utah, and in various federal courts. He produces the Xiphos public safety legal bulletin and his website can be found by clicking here.

1. United States v. Wurie, 2013 WL 2129119 (1st Cir. 2013). ?

2. Smallwood v. State, 2013 WL 1830961 (Fla. 2013) ?

3. Chimel v. California, 395 U.S. 752 (1969) ?

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