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# Use of Personal Cell Phones While On Duty: You Want My What...

By **Eric Daigle**

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**DAIGLE LAW GROUP**

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It is rare these days to find an individual without a personal cell phone in his possession at any given time during the day or night. Our society has created the ability and psychological need to be in constant contact with the world around us. The introduction of personal cell phones, however, has created many unforeseen issues for a variety of employers. While many employers forbid the use of personal cell phones during business hours for non-work related activities, some employers sanction the use of personal phones when it relates to that individual's employment. For many employers there are little to no ramifications for the use of personal cell phones to conduct work-related activities. What about in the field of law enforcement? What are the consequences for police departments and their officers when an officer utilizes a personal cell phone, while on duty, to conduct work-related activities?

It is a reasonable likelihood that, in the course of defending a client, a defense attorney will subpoena any and all records related to his client's arrest. Such records typically include police dispatch tapes, recordings, and other communications. Dispatch, emergency calls, and radio communications among officers are recorded conversations that are preserved for a certain period of time. What happens, however, when an officer utilizes his personal cell phone to communicate with dispatch and/or other officers during a pursuit, arrest, or other law enforcement activity? Can defense attorneys subpoena and have access to the personal cell phone records of individual police officers?

One New Mexico police officer found out just how the use of his personal cell phone during a pursuit and arrest can affect the outcome of a case. In *State of New Mexico v. Ortiz*<sup>[1]</sup>, the Defendant, Marty Ortiz, was indicted for DWI. During a hearing, the defendant sought to prove that the stop of his vehicle conducted by the Officer was "pretextual and illegal," and filed a motion to suppress evidence against him. The Defendant filed a request for an inspection of the videotape of the incident. The Defendant stated that the videotape of the stop indicated that the Defendant had "complete and lawful control of the vehicle and even used his turn signal to properly pull the vehicle over for the officer," thus indicating that the Defendant was not engaged in any driving behavior that would give the officer reasonable suspicion on which to stop the Defendant.

The Defendant also filed a motion to compel specific discovery seeking "any and all audio recordings and written logs including, but not limited to, dispatch records and phone records of any kind which are relevant to the stop and arrest . . . including any communications between [Officer] and any dispatcher,

police officers, or any other persons whatsoever.” The Defendant’s motion asserted that the videotape of the stop contained a six minute gap. As a result, the Defendant requested copies and access to evidence of all oral, electronic, telephonic, or written communications made between the Officer and any other person during this incident. The Defendant requested dispatch logs and communications between the Officer and dispatch and he also requested the production of any communications, including personal cell phone calls, which the Officer had with anyone during a specified timeframe.

The prosecutor for the case “strongly” objected to the discovery request for the Officer’s personal cell phone records on the basis that such information would not be discoverable in the case. The Defense counsel countered that he had received dispatch records for every officer involved except the arresting officer, and again requested records of any communications by the Officer, including personal or departmental cell phone records. The Defense counsel explained that the Defendant was only seeking records of communications the Officer had within the relevant six-minute period, the time period missing from the videotape. The Defense counsel further argued that the officer did not have an expectation of privacy of his personal cell phone records while on duty, on patrol, in a marked unit, or during an emergency or arrest situation.

After a hearing on the matter, the district court found that the Defendant raised a relevant issue and therefore had a right to access the requested information even without knowing whether any such information existed. The court orally granted the Defendant’s motion to compel specific discovery, but stated that “(1) the [cell] phone records requested were for a very finite period of time; (2) if there was no recording of a phone conversation, it would be appropriate to produce the phone record; (3) if there existed a defense to the discovery of the records, such as the disclosure of a confidential informant, the State could file a motion to prohibit the discovery; and (4) if there were personal matters irrelevant to the case, the State could file a motion for an in camera review.”

The State filed an amended response to Defendant’s motion to compel specific discovery and asserted that the Officer had a reasonable expectation of privacy in his personal cell phone records. The State cited *U.S. Constitution, Amendments I, IV, and XIV*; as well as the *N.M. Constitution*. The State also argued that “[p]ursuant to the Electronic[] Communications Privacy Act outlined in *18 U.S.C.A. §§ 2510, 2701[,] and 2703(c)(2) [(2006)]*, the party seeking disclosure of personal cell phone records must make a showing that there are reasonable grounds to believe that the contents of the records are relevant and material to an ongoing criminal investigation.” The State claimed that the Defendant failed to make a proper showing of either relevancy or materiality and that merely requesting the phone records did not satisfy the requirements for obtaining such records.

The district court found that the Defendant had made a threshold showing that the discovery requested was potentially material to the defense of his case and ordered the State to identify whether any such material evidence existed. Despite the district court's order, the State did not produce the records. As a result, the district court dismissed the charges against the Defendant with prejudice, in part due to the State's failure to comply with a discovery order. The Appellate Court concluded that the trial court did not abuse its discretion in doing so.

The Appellate Court further stated that the present case was not one that pertained to a secret recording of an officer's communication, an investigatory search into an officer's malfeasance by searching records of a service provider without the officer's consent, or a search of unreasonable scope. In fact, the court explained that the present case did not involve a search at all, nor did it involve a risk of violation of some protected individual interest in avoiding disclosure of personal matters.

The Appellate Court found no basis on which the State is permitted to assert an officer's privacy right to excuse the State from investigating the relevance and materiality to the defense of an on-duty, investigating officer's cell phone records within the State's control. The Court further found no basis on which the State is excused from producing documents, in camera or otherwise, or acting to protect production based on relevancy or confidentiality where, as seen here, the defense makes a rational, logical, threshold showing of control, materiality, and prejudice. Therefore, the Appellate Court upheld the district court's decision to dismiss the case with prejudice.

As we have found, the judicial system is slow to keep up with the ever-expanding world of technology. As the number of officers carrying and utilizing their personal cell phones while on duty increases and clever defense attorneys begin to realize the potential evidentiary value of those cell phone records and issue subpoenas on a more prevalent basis this particular topic will step into the spotlight.

What steps can police departments undertake now to ensure that such a situation does not arise in the future? A police department can protect itself and its officer by drafting comprehensive policies pertaining to the use of personal cell phones while on duty to conduct work-related activities. I recommend that officers put a Chinese wall between them and their personal owned electronics. The question for command staff is that to provide officers with the utmost protection should departments not allow officers to use personal cell phones to communicate with dispatch or other officers during a pursuit, arrest, or other law enforcement activity? In fact, should officers be instructed to never use a personal cell phone to conduct any type of job-related activities while on duty? Departments should instruct officers that all communications related to law enforcement activities must be conducted through the department sanctioned and provided communication devices, whether it is radio transmissions or department-owned and provided cell phones. If police departments issue department-

owned cell phones, officers must be instructed that such devices should not be used for personal communications.

Officers must understand that if they choose to utilize non-department issued communication devices to conduct their law enforcement duties those devices and their records may be up for review when defense attorneys come knocking on the discovery door. A police officer's privacy interests may take a back seat when a defense attorney makes a convincing case as to the need for such information and narrowly construes the requests for certain personal cell phone information or time frames that relate to a particular incident or case.

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1. *146 N.M. 873; 2009 NMCA 92; 215 P.3d 811; 2009 N.M. App. LEXIS 104 (2009) ?*

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