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No Warrant Needed to Search a Cell Phone Found on an Arrestee

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On January 3, 2011, in the case of <u>People v. Diaz</u>, #S166600, 2011 Cal. Lexis 1, the Supreme Court of California, in a 5–2 decision, held that if a cell phone is found on a custodial arrestee - incident to a lawful arrest - no search warrant is needed to review the contents of the cell phone (such as text messages).

The Court ruled that "like an article of clothing, the cell phone was an item of personal property on defendant's person at the time of his arrest" As such, "the police were entitled to inspect its contents without a warrant ... whether or not an exigency existed."

***** Facts

In 2007, a Ventura County Sheriff's Deputy arrested Greg Diaz for conspiracy to sell drugs, after a drug deal occurred in the back seat of a car Diaz was driving. Diaz was taken in custody to a sheriff's station where a cell phone found on Diaz was booked into evidence.

When Diaz denied any knowledge of the drug deal in the car, the Sheriff's Deputy confronted Diaz with a text message he had located on Diaz's cell phone which indicated Diaz intended to sell the drugs for \$80. After being confronted with the text message, Diaz admitted to participating in the sale of illegal drugs.

At his criminal trial, Diaz sought to suppress the text message from his cell phone as the fruit of an unconstitutional search, in violation of the Fourth Amendment. The trial court denied the motion holding that there was no violation of Diaz's rights. An appellate court affirmed the trial court admission of the evidence, as not in violation of the Fourth Amendment. Diaz appealed to the California Supreme Court which affirmed the appellate court's decision.

❖ Fourth Amendment warrant requirement and exceptions

The Fourth Amendment to the U.S. Constitution protects people from "unreasonable searches and seizures" by requiring that the government first secure a warrant based on probable cause. The Supreme Court held, in *Katz v. United States*, 389 U.S. 347 (1967), that warrantless searches "are per se unreasonable … subject only to a few specifically established and well-delineated exceptions."

Relying upon U.S. Supreme Court precedents, the California Supreme Court ruled, in *Diaz*, that a warrantless search of a cell phone found on an arrestee falls within one "of the specifically established exceptions to the Fourth Amendment's warrant requirement [being]...'a search incident to lawful arrest.""

The Court reasoned that searching a cell phone found on an arrestee (and discovering a text message offering the sale of illegal drugs) is akin to searching a cigarette pack found in an arrestee's shirt pocket (and discovering illegal drugs in the cigarette pack), see *United States v. Robinson*, 414 U.S. 218 (1973), or inspecting clothes worn by an arrestee at time of arrest (and discovering paint chips which match paint from a crime scene), see *United States v. Edwards*, 415 U.S. 800 (1974).

Delayed search following an arrest

In the Edwards case, the Supreme Court said that "once the accused is lawfully arrested and is in custody, the effects in his possession ... that were subject to search at the time and place of his arrest may lawfully be searched and seized without a warrant even

though a substantial period of time has elapsed between the arrest and subsequent administrative processing"

The Diaz court found that the delayed search of the cell phone, which occurred ninety minutes after its seizure, at the sheriff's station, was constitutional because "a delayed search of an item of personal property found upon an arrestee's person no more imposes upon the arrestee's constitutionally protected privacy interest than does a search at the time and place of arrest."

The applicable warrant exception, ruled the court, entitles the "police not only to 'seize' anything of importance they find on the arrestee's body ... but also to open and examine what they find" - including opening and examining a cell phone."

The Court stated that "the scope of a permissible warrantless search" of a cell phone does not depend "on the nature or character" of the cell phone, and the Court recognized that "other cell phones [different from the one in this case] may have a significantly greater storage capacity." In other words, data on any type of cell phone (including smart phones which have emails, pictures, computer files, etc.), found on the person of someone lawfully arrested, is subject to a warrantless search.

! Limitations on warrantless search of cell phone

The Court drew a sharp distinction between "warrantless searches 'of the person' rather than searches 'of possessions within an arrestee's immediate control." Search of the latter, such as a footlocker in the trunk of a car incident to arrest, generally does not qualify as a valid warrantless search.

In the case of <u>United States v. Chadwick</u>, 433 U.S. 1 (1977), narcotic agents observed Chadwick place a 200 pound footlocker in the truck of his car. Shortly after arresting and transporting Chadwick to a federal building, the agents opened the footlocker without obtaining a warrant.

As the Court explained, "warrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the 'search is remote in time or place from the arrest,'...or no exigency exists.

Once law enforcement officers have reduced luggage, or other personal property not immediately associated with the person of the arrestee, to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest."

The *Diaz* court noted that *Chadwick* "did not overrule *Robinson* or *Edwards*, but distinguished them as involving warrantless searches 'of the person' rather than searches 'of possessions within an arrestee's immediate control."

❖ Other jurisdictions ^{1}

In a 4-to-3 opinion the Ohio Supreme Court of Ohio reasoned that "because a person has a high expectation of privacy in a cell phone's contents," police, after seizing a cell phone from an arrestee's person, "must ... obtain a warrant before intruding into the phone's contents." In Ohio, a warrantless search of data within a cell phone seized incident to a lawful arrest is prohibited by the Fourth Amendment when the search is unnecessary for the safety of law enforcement officers and there are no exigent circumstances. State v. Smith, #2008-1781, 124 Ohio St.3d 163, 2009-Ohio-6426, 920 N.E.2d 949, 955.

The 4th and 5th federal circuits have allowed warrantless cell phone searches incident to arrest. *United States v. Murphy*, #07-4607, 552 F.3d 405 (4th Cir. 2009) and *United States v. Finley*, #06-50160, 477 F.3d 250 (5th Cir. 2007). A federal district court in Massachusetts also is in agreement. *United States v. Wurie*, # cr-08-10071, 612 F.Supp.2d 104 (D. Mass. 2009).

***** How this affects your agency

Except in Ohio, if a suspect is lawfully arrested, and then searched incident to the arrest, a cell phone found on the suspect's person may be both seized and searched without a warrant – and the search does not need to be related to the cause of the arrest.

However, if a cell phone is not on the arrested person, then a warrantless search of the cell phone is not a valid search incident to arrest. A search would not be valid, for

example, if a cell phone was found in the trunk of a car when the driver is arrested; in that case, a warrant would be needed to search the phone.

A question can still be raised regarding the delay of a search. The *Diaz* court did not state exactly how long a delay of a warrantless search of a cell phone seized pursuant to a lawful arrest would be considered reasonable, however, if the search becomes "remote in time ... from the arrest" then the search is subject to challenge as an invalid warrantless search.

The court did find ninety minutes to be a reasonable delay, and cited to a ten hour delay in a prior U.S. Supreme Court case as having been reasonable in that case (see *Edwards*).

One can anticipate that the application of this decision will be challenged in many cases based on the specific facts of those cases. However, until or unless the federal courts weigh in on his decision, under California law, warrantless searches of cell phones found on the person of an arrestee are valid, and evidence of culpability found on a cell phone is admissible at trial.

As always, before acting on any of this information, you must first consult with, and secure advice from, your agency's legal counsel.

Note:

1. The section on other jurisdictions was added by the senior AELE legal editor.

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