

Searching Cell Phones Seized Incident to Arrest

By M. WESLEY CLARK, J.D., LL.M.



© stockxpert.com

The January 1997 issue of the *FBI Law Enforcement Bulletin* contained the article “Searching Pagers Incident to Arrest.” The use of pagers now is on the decline, but cell phones seemingly are everywhere. It is the rare arrestee today who is not found in possession of a cell phone. This article addresses the legal authority for an officer to search a cell phone incident to arrest.

General Principles

Unlike the constantly evolving state of technology, the general state of the law regarding searches incident to arrest is settled and well understood. “A person validly arrested may be searched without a warrant. There does not need to be any indication that the person arrested possessed weapons or evidence. ... [P]robable cause for the search is not required. The

lawful arrest, standing alone, authorizes a search.”¹ A search is not incident to an arrest, however, unless “it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest.”² The reasons justifying such a search are “1) to seize weapons to protect the arresting [law enforcement personnel]; 2) to prevent destruction of evidence; and 3) to prevent escape.”³

Consistent with the rationale behind the search incident to arrest, officers are permitted to search both the arrestee's person and the areas under the arrestee's immediate control. The latter is sometimes referred to as the area into which an arrestee could conceivably lunge, i.e., the "area from within which [the arrestee] might gain possession of a weapon or destructible evidence."⁴ Importantly, "[u]nlike searches of the person, searches of possessions within an arrestee's immediate control cannot be justified by any reduced expectations of privacy caused by the arrest."⁵ In other words, if an item "not immediately associated with the person of the arrestee" is removed from the arrestee's immediate control such that any search thereafter would be 1) "remote in time or

place from the arrest" or 2) not subject to exigent circumstances (e.g., possible destruction of evidence), it can no longer be searched by law enforcement as incident to the arrest.⁶

With the advent of technology and the proliferation of personal electronic devices, particularly cell phones, courts have been called upon to address the application of the search incident to arrest doctrine to items discovered on the person of the arrestee unimagined at the time. Recent technological developments have led to the consolidation of personal communication devices into one. Today, it is less likely that officers will encounter pagers. Instead, when taking someone into custody, officers are likely to discover only one device, the cell phone, performing multiple

functions, such as phone capability, texting, e-mailing, and Internet browsing.

Developments in the Application of Search Incident to Arrest to Cell Phones

In early 2007, the U.S. Court of Appeals for the Fifth Circuit decided whether a federal agent could search a cell phone incident to arrest. In *United States v. Finley*,⁷ the defendant was arrested by DEA, and, during a search incident to his arrest, a DEA special agent (SA) found a cell phone in Finley's pocket. The phone was not searched until after the agent had driven Finley to a cohort's residence where DEA and the local police were in the process of executing a search warrant. The SA "searched through the phone's call records and text messages," and several of the latter seemed to the SA "to be related to narcotics use and trafficking," the meaning of which he effectively explained during the course of his trial testimony.⁸

Citing a case holding that the search of a pager seized incident to an arrest was lawful,⁹ the Fifth Circuit upheld the SA's exploitation of the information on Finley's mobile phone. "The district court correctly denied Finley's motion to suppress the call records and text messages retrieved from his cell



Mr. Clark is a senior attorney in the Domestic Criminal Law Section, Office of Chief Counsel, DEA.

“...when taking someone into custody, officers are likely to discover only one device, the cell phone, performing multiple functions, such as phone capability, texting, e-mailing, and Internet browsing.”

phone[.]”¹⁰ said the appellate panel. The fact that the search of the phone did not occur at the precise moment and place of Finley’s arrest did not concern the court.

In general, as long as the administrative processes incident to the arrest and custody have not been completed, a search of effects seized from the defendant’s person is still incident to the defendant’s arrest. Although the police had moved Finley, the search was still substantially contemporaneous with his arrest and was therefore permissible.¹¹

The court did not reveal how long after Finley’s arrest his phone was searched nor did the panel indicate how far he was driven before the text messages were retrieved.¹² The court determined that as the cell phone was found on the person of the arrestee, the search of the phone need not have occurred at the moment of the arrest, provided it was searched incident to the arrest as time permitted. The fact that the phone was not searched immediately upon the arrest did not change the validity of the search.

Finally, there was no explanation regarding whether incoming text messages would, at some point, overwrite previously existing text contained in the phone. If such were the case, an exigency would

exist, thus providing additional rationale in support of a search incident to an arrest. The Finley court, however, did not go looking for exigent circumstances to justify exploration of the phone’s text messages, holding simply that “[i]t is well settled that ‘in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a ‘reasonable’ search under that Amendment.’”¹³

“
...today’s mobile phones are...containing much more significant information than could be found within items...historically searched incident to arrest, such as address books, pagers, purses, and wallets.
”

In *United States v. Pena*,¹⁴ the cell phone appears to have been taken from the defendant not at the instant time of arrest but rather during booking¹⁵—a search that the U.S. magistrate judge nevertheless determined was incident to Pena’s arrest. The case did not discuss the time and distance from the

point of arrest to booking nor was there any mention of any exigency which also would have weighed in favor of the somewhat contemporaneous search incident to Pena’s arrest. The court, without elaboration, simply concluded that the “cellular phone” (as opposed to a specific kind of data, e.g., address book phone numbers or text messages, that might be contained therein) “should not be suppressed.”¹⁶

In *United States v. Brookes*,¹⁷ the court upheld the search incident to arrest of a cell phone and the retrieval of phone numbers from it. The court based its reasoning on a prior decision that allowed the retrieval of numbers from a pager seized incident to arrest¹⁸ and also here allowed the investigative use of numbers stored on the defendant’s cell phone. “Because the search of a ‘person’ has been held to include a person’s wallet or address book, the Court [in the earlier decision] found that the search of the defendant’s pager was a search of his ‘person’ and thus was valid.”¹⁹ Because the phone numbers in the instant case were obtained soon after the defendant’s arrest, “the Court shall not suppress the...cell phone or the recording of the numbers stored therein.”²⁰

In *United States v. Zamora*,²¹ the defendant argued, among other things, that the

search of his cell phone incident to arrest was improper because law enforcement did not first secure the phone and *then* seek a search warrant. In other words, there were no exigent circumstances justifying the immediacy of the search. The district court was unimpressed, noting that

[i]n this case the phones were reasonably believed by the investigating agents to be dynamic, subject to change without warning by a call simply being made to the instrument. With each call is the risk that a number stored would be deleted, including the loss of calls made to or from the instrument in connection with the transportation and ultimate secured storage of the [precursor chemical] at issue here.²²

This understanding led the court to conclude that the search of the phone incident to the arrest was proper because “[i]t was the function and limitation of the cell-phone technology which motivated the investigating agents to conduct an immediate search of the phones, rather than seek a warrant,”²³ and that, therefore, such concerns were sufficiently “legitimate” for the warrantless search that actually occurred. “The arrests...being proper, so were the searches incident to their arrests, and exigent

circumstances otherwise authorized the seizure of the cell phones and the search of their electronic contents.”²⁴ The court’s reasoning suggests that if incoming calls did not, in fact, overwrite data previously stored in the phone, the district judge would not have upheld a warrantless search and seizure of the information contained therein.



Highlighting the uncertainty in this area is a recent federal district court decision in which a federal judge suppressed the results of a warrantless search of a cell phone seized incident to arrest. In *United States v. Park*,²⁵ a district court judge concluded that a search of a cell phone conducted while booking the arrestee into jail roughly 1½ hours after the arrest violated the Fourth Amendment.

The judge ruled that delay between the arrest and the search rendered acquisition of information contained in the

phone *not* “roughly contemporaneous with the arrests.” Even so, the warrantless phone search would have been salvageable if one could consider retrieval of the mobile to have resulted from a search of the *person* or the person’s *clothing* as opposed to a search of a *possession*, such as a suitcase or briefcase, *within the arrestee’s immediate control*. The district judge ultimately concluded that the seized cell phone fell into the last category.²⁶ While it is necessary and appropriate to take possession of the items of property on the arrestee as part of the routine booking process and account for this property consistent with “standard police department procedure,”²⁷ examining the contents of the phone would exceed the permissible scope of this authority. As the court noted, had the contents of the cell phone been examined pursuant to such an articulated, routine booking practice, this would not have been sufficient to save the day (or the data) because the “purpose of a booking search is to create an inventory” that the officers could have satisfied “simply by listing defendants’ cell phones as items on the booking forms.”²⁸

In addition to the court’s view that the search and retrieval of the data was not within the permissible scope of a search incident to arrest, the court also expressed concern with the

extension of such a broad warrantless search authority in this context. The court commented on how today's mobile phones are similar to small computers and thus capable of containing much more significant information than could be found within items more routinely and historically searched incident to arrest, such as address books, pagers, purses, and wallets.

[M]odern cellular phones have the capacity for storing immense amounts of private information. Unlike pagers or address books, modern cell phones record incoming and outgoing calls, and can also contain address books, calendars, voice and text messages, email, video and pictures.²⁹

The district court thus renounced the reasoning in the Fifth Circuit's decision in *Finley*, discussed above, and instead determined that "unlike the *Finley* court,...for the purposes of Fourth Amendment analysis cellular phones should be considered 'possessions within an arrestee's immediate control' and not part of 'the person.'"³⁰ Once such an item is removed from the arrestee's immediate control, there is no danger that evidence will be destroyed or that the seized item will contain or be used as a weapon. At the end of the day, "possessions within an arrestee's immediate control have

Fourth Amendment protection at the station house unless the possession can be characterized as an element of the clothing, or another exception to the Fourth Amendment requirements [such as a booking search] applies."³¹

The government might have helped its position by explaining how the phones' seizure and examination prevented the *destruction of evidence*, such as

“
The weight of the case law supports the warrantless retrieval of text messages, call histories, and stored numbers, as well as names and addresses from a cell phone seized incident to arrest....
”

by 1) the targets themselves and possibly by 2) overwriting occasioned by incoming communications. Of particular concern with respect to the preservation of evidence is the ability that service providers offer to some customers enabling them to remotely destroy data on their cell phones.

Subsequent to both *Finley* and *Park* and considering both of those opinions, the Ohio Court of Appeals had occasion

in *State v. Smith*³² to review a set of facts analogous to those in the two earlier opinions. The defendant, Smith, was searched incident to his arrest and a cell phone was recovered *from his person*. The phone was later examined with helpful results (call records and stored phone numbers) just before Smith was booked into jail. Although the record did not make clear whether the phone was searched at the scene of the arrest or at the police station when the evidence was being secured, the distinction did not matter because even if the search of the phone had occurred away from the arrest scene, it was "substantially contemporaneous" with the apprehension.³³ The July 2008 *Smith* decision found *Finley* to be more persuasive than *Park* and upheld the trial court's order that Smith's motion urging suppression of the information gleaned from the phone be denied. The *Smith* court followed the *Finley* reasoning that the cell phone was an item found on and part of the defendant's person and rejected the *Park* determination that such an instrument is a possession "within an arrestee's immediate control." However, the court did draw the line at the retrieval of certain information, deciding to suppress incriminating photos that the police also found on Smith's phone because it concluded that the police

lacked sufficient grounds to search for pictures.³⁴

The concurring judge posited an additional rationale for upholding the trial court's ruling adverse to the suppression motion, "A reasonable police officer could conclude that there might be a limit to the number of previous phone numbers contacted on the cell phone, and that failure to obtain those numbers promptly might result in their becoming purged from the cell phone's memory as new calls came in,"³⁵ thus supporting the rise of exigent circumstances permitting retrieval of the data without waiting to secure a search warrant.

The dissenting judge, finding that the search had not been "substantially contemporaneous" with Smith's arrest, preferred the logic of *Park* and concluded that "the modern cellular phone is increasingly akin to a modern personal computer." This compels the conclusion that it "should be placed in the more protected category of possessions within the immediate control of the accused" for which, "[o]nce contemporaneity [with the arrest] is lost" and "the justifications for a valid search incident to arrest [no longer] have... meaning[,] [t]he police should obtain a search warrant, just as they would when they seize a personal computer from an accused."³⁶

Conclusion

The weight of the case law supports the warrantless retrieval of text messages, call histories, and stored numbers, as well as names and addresses from a cell phone seized incident to arrest if the information is culled at a not too remote time and distance from the point of apprehension (such as at the police station or place of booking/detention). However, some are of the opinion that such searches are outside the scope

“

...officers may find that erring on the side of caution and securing a warrant when practicable is in the best interests of the investigation.

”

of the search incident to arrest. Given the uncertainty, officers should consult with the appropriate prosecutor's office to determine if case law in their jurisdiction follows the rationale in the *Finley* or *Park* decision. Technology and the law in this are still developing. Recognizing this uncertainty, officers may find that erring on the side of caution and securing a warrant when practicable is in the

best interests of the investigation. Of course, if time is truly of the essence, an understanding that a delay in conducting the search of the phone would run the risk of data loss from incoming communication traffic, such as by overwriting or purging, may provide a legal theory in support of the search. ♦

Endnotes

¹ James Cissell, *Federal Criminal Trials* § 2-5(a) (6th ed. 2003).

A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which established the authority to search, and...in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a "reasonable" search under that Amendment.

United States v. Robinson, 414 U.S. 218, 235 (1973).

² *Id.* at § 2-5(a)(4). A full discussion of what constitutes a valid search incident to an arrest is outside the scope of this article.

³ *Id.*

⁴ *United States v. Chadwick*, 433 U.S. 1, 14 (1977)(quoting *Chimel v. California*, 395 U.S. 752, 763 (1969)). *Chadwick* was abrogated on other grounds, *California v. Acevedo*, 500 U.S. 565 (1982).

⁵ *Id.* at 16 n. 10.

⁶ "Once law enforcement officers have reduced...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." *Id.* at 15.

⁷ 477 F.3d 250 (5th Cir.), *cert. denied*, ___ U.S. ___, 127 S.Ct. 2065 (2007). A cell

phone cannot be searched incident to a “reasonable suspicion” stop, *i.e.*, a detention permitted by *Terry v. Ohio*, 392 U.S. 1(1968), *see United States v. Zavala*, No. 07-20200, 2008 WL 3877232 (Aug. 22, 2008 5th Cir.).

⁸ *Finley*, 477 F.3d at 254.

⁹ *United States v. Ortiz*, 84 F.3d 977 (7th Cir.), *cert. denied*, 519 U.S. 900 (1996)(because incoming pages erase existing ones or stored pages can easily be destroyed, it is “imperative” that pagers be searched incident to arrest to preclude destruction of evidence); *United States v. Stroud*, 45 F.3d 438 (9th Cir. 1994) (unpublished)(reasonable expectation of privacy destroyed by seizure incident to arrest plus potential destruction of evidence by incoming pages constituted exigent circumstances); *United States v. Chan*, 830 F. Supp. 531 (N.D. Cal. 1993)(expectation of privacy in pager destroyed by search incident to arrest).

¹⁰ *Finley*, 477 F.3d at 260.

¹¹ *Id.* at 260 n.7 (internal citations omitted).

¹² Note that call records and text messages are generally stored in a cell phone’s physical memory. In some instances, however, such as when the phone is out of network range, text messages may be temporarily stored by the provider until such time as the phone comes within range, at which point the text messages will be pushed to the cell phone. If the text messages are in storage with the service provider, then the provisions of 18 U.S.C. § 2703, part of the *Stored Communications Act*, would apply, thus necessitating, depending on the circumstances, a search warrant, less-than-probable-cause court order, or subpoena. If text messages are in storage with the service provider for 180 days or less, a search warrant is required. 18 U.S.C. § 2703(a). If they are held longer by the carrier, then a search warrant, subpoena (administrative, grand jury, or trial), or court order may be employed. 18 U.S.C. § 2703(b).

¹³ *Finley*, 477 F.3d at 259 (citation omitted).

¹⁴ 51 F. Supp. 2d 367 (W.D.N.Y. 1999).

¹⁵ “Booking” or inventory searches are outside the scope of this article. *See, generally; Florida v. Wells*, 495 U.S. 1 (1990); *Colorado v. Bertine*, 479 U.S. 367 (1987); and *Illinois v. Lafayette*, 462 U.S. 640 (1983).

¹⁶ *Pena*, 51 F. Supp. 2d at 373.

¹⁷ 2005 WL 1940124 (D.V.I. 2005).

¹⁸ *United States v. Lynch*, 908 F. Supp. 284 (D.V.I. 1995).

¹⁹ *Brookes*, 2005 WL 1940124 at *3.

²⁰ *Id.* (citation omitted).

²¹ No. 1:05 CR 250 WSD, 2006 WL 418390 (N.D. Ga. 2006). For other cases upholding the examination of a cell phone searched incident to arrest, *see United States v. Young*, 278 Fed.Appx. 242 (4th Cir. 2008)(unpublished)(search of text messages on cell phone incident to arrest justified to preclude possible deletion); *United States v. Santillan*, No. CR 07-2015 TUC JMR, 2008 WL 3190032 (D. Ariz. Jul. 14, 2008)(search only of call histories roughly contemporaneous with arrest; *Park*, *infra* note 25, distinguished); *United States v. Curry*, No. 07-100-P-H, 2008 WL 219966 (D. Me. Jan. 23, 2008)(cell phone searched at police station ½ hr. after arrest was “substantially contemporaneous” therewith hence incident to arrest); *United States v. Dennis*, Cr. No. 07-008-DLB, 2007 WL 3400500 (E.D. Ky. Nov. 13, 2007)(*Finley*, *supra* note 7, followed; call history log on cell phone validly obtained as incident to arrest); *United States v. Urbina*, No. 06-CR-336, 2007 WL 4895782 (E.D. Wis. Nov. 6, 2007)(distinguishing *Park*, *infra* note 25, search of cell phone “immediately” after arrest and limited to address book and call history held incident to arrest where significant purpose of search was to preclude deletion of evidence); *United States v. Mercado-Nava*, 486 F. Supp. 2d 1271 (D. Kan. 2007)(citing *Finley*, *supra* note 7, search of cell phones immediately upon arrest for stored numbers of incoming/outgoing calls upheld); *United States v. Espinoza*, No. 06-40130-01-JAR, 2007 WL 1018893 (D. Kan. Apr. 3, 2007)(citing *Finley*,

downloading all sent and received phone numbers at location away from point of arrest within 1 hour 15 minutes after apprehension but before booking held proper); *United States v. Cote*, No. 03CR271, 2005 WL 1323343 (N.D. Ill. May 26, 2005) (search of cell phone incident to arrest for call log, phone book, and wireless Web inbox “analogous” to searches of wallets and address books; fact that actual examination of mobile device was 2½ hrs. after arrest at police station was irrelevant); *United States v. Parada*, 289 F. Supp. 2d 1291 (D. Kan. 2003)(search of cell phone incident to arrest proper as inventory search; exigent circumstances occasioned by deletion/overwriting justified accessing numbers of received calls).

²² *Zamora*, 2006 WL 418390 at *4.

²³ *Id.*

²⁴ *Id.* at *5.

²⁵ No. CR 05-375 SI, 2007 WL 1521573 (N.D. Cal. May 23, 2007). This decision appears to fly in the face of *United States v. Edwards*, 415 U.S. 800 (1974), a decision the *Park* court cites (search incident to arrest may properly be conducted later and away from arrest location at place of detention; subsequent laboratory examination results of seized items also admissible). For a decision similar to but slightly before *Park*, *see United States v. LaSalle*, Cr. No. 07-00032 SOM, 2007 WL 1390829 (D. Haw. May 9, 2007)(search of cell phone at DEA office location away from point of arrest and 2 hours 15 minutes to 3 hours 45 minutes after apprehension held not “roughly contemporaneous with arrest”).

²⁶ Reviewing Ninth Circuit and Supreme Court case law, the district judge observed that whereas a wallet would be considered part of an arrestee’s clothing, neither a purse nor a suitcase nor a briefcase would be. *Id.* at *7. The district judge reached her conclusion after having been presented by the government with case law in addition to *Finley*, albeit unpublished, holding the opposite: that retrieval of data from a cell phone seized from an arrestee

FBI Law Enforcement Bulletin Author Guidelines

and searched “later” constituted a search of the person, e.g., *United States v. Brookes*, No. CRIM 2004-0154, 2005 WL 1940124 (D. V.I. Jun. 16, 2006).

Unfortunately, the facts reported in the court’s opinion do not clearly reflect that the cell phone was taken from Park’s person. The court even noted that “the record is ambiguous, and somewhat conflicted, regarding exactly when and how officers searched defendants’ cellular phones.” *Park*, 2007 WL 1521573 at *1.

²⁷ *Id.* at *1.

²⁸ *Id.* at *11. See also *United States v. Wall*, No. 08-60016-CR-ZLOCH, 2008 U.S. Dist. LEXIS 103058 (S.D. Fla. Dec. 22, 2008).

²⁹ *Id.* at *8.

³⁰ The district judge also found that the facts in *Finley* were distinguishable because there the appellate panel found that the search was “substantially contemporaneous” with the arrest whereas here such was determined not to be the case. *Id.* at *8. In point of fact, however, the delays before the cell phone searches in both cases were probably somewhat equivalent.

³¹ *Id.* at *7, quoting from *United States v. Monclavo-Cruz*, 662 F.2d 1285, 1291 (9th Cir. 1981)(search of purse at station house an hour after arrest was not incident to arrest)(internal quotation marks omitted; explanation supplied).

³² No. 07-CA-47, 2008 WL 2861693 (Ohio Ct. App. Jul. 25, 2008).

³³ The Ohio court quoted from *Finley*, *supra* note 7. See text accompanying note 5, *supra*.

³⁴ *Id.* at *8.

³⁵ *Id.*

³⁶ *Id.* at *10.

Law enforcement officers of other than federal jurisdiction who are interested in this article should consult their legal advisors. Some police procedures ruled permissible under federal constitutional law are of questionable legality under state law or are not permitted at all.

Length: Manuscripts should contain 2,000 to 3,500 words (8 to 14 pages, double-spaced) for feature articles and 1,200 to 2,000 words (5 to 8 pages, double-spaced) for specialized departments, such as Police Practice.

Format: Authors should submit three copies of their articles typed and double-spaced on 8 ½- by 11-inch white paper with all pages numbered, along with an electronic version saved on computer disk, or e-mail them.

Criteria: The *Bulletin* judges articles on relevance to the audience, factual accuracy, analysis of the information, structure and logical flow, style and ease of reading, and length. It generally does not publish articles on similar topics within a 12-month period or accept those previously published or currently under consideration by other magazines. Because it is a government publication, the *Bulletin* cannot accept articles that advertise a product or service. To ensure that their writing style meets the *Bulletin*’s requirements, authors should study several issues of the magazine and contact the staff or access <http://www.fbi.gov/publications/leb/leb.htm> for the expanded author guidelines, which contain additional specifications, detailed examples, and effective writing techniques. The *Bulletin* will advise authors of acceptance or rejection but cannot guarantee a publication date for accepted articles, which the staff edits for length, clarity, format, and style.

Submit to: Editor, *FBI Law Enforcement Bulletin*, FBI Academy, Law Enforcement Communication Unit, Hall of Honor, Quantico, VA 22135; telephone: 703-632-1952; fax: 703-632-1968; e-mail: leb@fbiacademy.edu.