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Searching the Contents of Cell Phones Seized Incident to Arrest

United States v. Finley, 2007 U.S. App. LEXIS 1806 (5th Cir. 2007)

A recent decision of the federal Fifth Circuit Court of Appeals addressed the issue of whether an officer may lawfully examine the stored numbers and text messages of a defendant's cellular phone as a search incident to arrest. United States v. Finley, 2007 U.S. App. LEXIS 1806 (5th Cir. 2007). The defendant was arrested after the passenger in his work vehicle delivered a quantity of methamphetamine to undercover law enforcement agents. His cell-phone, which was provided by his employer, was taken from his person and he and his co-defendant were driven to the co-defendant's residence where a search warrant was being executed. While at the co-defendant's residence, law enforcement agents examined the telephone numbers to which calls were placed and received from defendant's telephone. They also examined the text messages sent and received. Some of the information from the phone was inculpatory and used by the government at his trial.

The defendant sought to suppress the evidence gathered from the phone, claiming that it was the fruit of an unlawful search. The motion was denied, defendant was convicted, and subsequently appealed. The Fifth Circuit affirmed defendant's conviction and held that the search of the contents of the cell phone was a valid search incident to arrest.

The court first held that defendant did have standing to challenge the search of the cell phone, as he had an actual expectation of privacy in the contents of the cell phone and that his expectation was objectively reasonable. However, the court decided that the search was a valid search incident to defendant's arrest. The court reasoned that the authorized scope of a search incident to arrest includes a search for evidence of defendant's crime for the purpose of preservation, as well as weapons and instruments of escape. United States v. Robinson, 414 U.S. 218, 233 (1973). This includes searching closed containers on the defendant's person, and those within the defendant's reach. New York v. Belton, 453 U.S. 454, 460 (1981). The court further reasoned that the fact that the search of the cell phone did not occur immediately after the custodial arrest did not change the validity of the search. Relying on United States v. Edwards, 415 U.S. 800 (1974), the court held that a search incident to arrest does not have to occur at the exact time and place of the arrest. As long as the search is substantially contemporaneous with the arrest, including during the administrative processes necessary following an arrest, then the exception to the warrant requirement is still applicable.

Georgia Cases

In Lopez v. State, 267 Ga. App. 532, 601 S.E. 2d 116 (2004), the Georgia Court of Appeals examined the issue of whether a seizure and subsequent search of the cell phone contents

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of a defendant's cell phone was a valid search incident to arrest. Defendant was arrested for cocaine trafficking and his cell phone was seized from his person. The court did not actually rule on the issue as it found that, even if the failure to suppress the evidence gathered from the phone was error, it was harmless beyond a reasonable doubt. Lopez, 267 Ga. App. at 538.

The court did cite to several Georgia cases as standing for the proposition that an officer conducting a search incident to arrest may seize items which are fruits or instrumentalities of a crime. Bagwell v. State, 214 Ga. App. 15, 446 S.E. 2d 739 (1994); Vega v. State, 236 Ga. App. 319, 512 S.E. 2d 65 (1999). The court also reasoned that, from the incriminating evidence that was gathered from the defendant's cell phone, it was an instrumentality of the crime he was charged with.

In United States v. Zamora, 2005 U.S. Dist. LEXIS 40775, (N.D.Ga. 2005), a federal judge denied defendant's motion to suppress evidence gathered from a search of the contents of defendant's cell phone. The court held that the search was both a valid search incident to arrest, and was reasonable due to the need to recover the information before it could be lost or corrupted. See Also United States v. Ortiz, 84 F.3d 977 (7th Cir. 1996)(holding that warrantless search of pager for information was valid search incident to arrest); United States v. Romero-Garcia, 991 F. Supp. 1223 (D. Or. 1997)(search of pager information without warrant was valid due to exigency of gathering the information before it was lost or corrupted.) In Zamora, the court also distinguished cases where evidence seized from luggage was suppressed, when the luggage was searched without a warrant. See United States v. Johnson, 588 F.2d 147 (5th Cir. 1979). The court held that cell phones were more analogous to the search of papers and the contents of a wallet, which have been held to be within the scope of a lawful search incident to arrest. United States v. Richardson, 764 F.2d 1514 (11th Cir. 1985).

Thus, although there are no Georgia cases which squarely hold that a search of a cell phone's contents, substantially contemporaneous with arrest, is a per se valid search incident to arrest, there is substantial persuasive authority for that proposition.