

ORIGINAL
ON COMPUTER - JJ

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Appellee,

vs.

ANTWAUN SMITH,

Appellant.

* CASE NO. 2008-1781
*
* On Appeal from the
* Greene County Court of Appeals
* Second Appellate District
*
* Court of Appeals
* Case No. 07-CA-47
*

MERIT BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF OHIO FOUNDATION, INC., IN SUPPORT OF APPELLANT, ANTWAUN SMITH

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INTERESTS OF AMICI

Amicus Curiae, the American Civil Liberties Union of Ohio Foundation, Inc. (ACLU of Ohio) is a non-profit, non-partisan membership organization devoted to protecting basic constitutional rights and civil liberties for all Americans. The ACLU of Ohio's commitment to the Bill of Rights includes commitment to the Fourth Amendment's protections against unreasonable searches and seizures and also to the protections of Section 14, Article I of the Ohio Constitution. In support of those protections, and the interests they embody against warrantless snooping by the government, the ACLU of Ohio offers this brief to assist the Court in resolving this case.

STATEMENT OF THE CASE

Amicus adopts Appellant's statement of the case.

ARGUMENT

Proposition of Law: A cellular telephone, even when seized incident to arrest, may not be searched without a warrant.

As the State acknowledged in its Memorandum in Response,¹ whether police may search without warrant a cell phone seized as an incident of arrest is a question of first impression in Ohio. It is also an important one as today cell phones are nearly ubiquitous. Yet the case law is thin, and what there is mostly lacks any real analysis. Thus, this case calls on this Court to perform a careful analysis based on the underlying rationale of the Fourth Amendment to the United States Constitution² and its counterpart in Section 14, Article I of the Ohio Constitution.

In *United States v. Finley* (C.A.5, 2007), 477 F.3d 250, the Fifth Circuit held that the search of a cell phone as an incident of arrest is justified because a cell phone is a container, and containers are subject to search under *New York v. Belton* (1981), 453 U.S. 454. *Finley, supra*, at 260. But the underlying claim that cell phones are containers was subjected to no scrutiny since it was *Finley's* own claim. Moreover, the *Finley* court seems to say, cell phones are like pagers which may be searched incident to arrest. *Id.*, citing *United States v. Ortiz* (C.A.7, 1996), 84 F.3d 977. But that holding, too, is more declared than examined.

Courts that have examined the issue carefully have reached a different conclusion. In *United States v. Park* (N.D. Cal. 2007), No. CR05-375SI, 2007 WL 1521573, the court noted but rejected *Finley*. Cell phones are not like pagers, it said. "Unlike pagers or address books, modern cellular phones record incoming and outgoing calls, and can also contain address books, calendars, voice and text messages, email, video and pictures." *Id.* at *8

In *United States v. Wall* (S.D. Fla. 2008), No. 08-60016-CR, 2008 WL 5381412, the court reached a similar result. Like the court in *Park*, the court in *Wall* recognized that *Finley*

¹ Memorandum at 5. Actually, the state filed a Memorandum in "Opposition of Jurisdiction."

² Made applicable to the states through the Fourteenth Amendment. *Mapp v. Ohio* (1961), 367 U.S. 643.

was the first significant ruling on the subject. And also like the court in *Park*, the court in *Wall* found *Finley* deficient. “The Fifth Circuit has extended the holding of *Ortiz* to searches of cell phones. *United States v. Finley*, 477 F.3d 250, 260 (5th Cir.2007). However, the *Finley* court did not explain why cell phones should be treated the same as pagers for purposes of the Fourth Amendment.” *Wall* at *8.

Park and *Wall* are correct. Cell phones are different. Even the simplest of today’s cell phones do more than just make and receive telephone calls. Typically, they have the capability of sending, receiving, and storing text messages. They have built in cameras and can take pictures, send them wirelessly to others, and store them. They record not only phone numbers that people intentionally left for them, as do pagers, but lists of both numbers called and numbers from which calls were received, commonly with details of both date/time and call duration. More sophisticated phones contain complete address books, appointment calendars, and e-mail. And they can surf the internet. People store everything from recipes and shopping lists to pictures of their children and their social security and bank account numbers on their cell phones. When the phones are used by employees, they often contain highly confidential business information. Rather than pagers, today’s cellular phones are properly analogized to a combination telephone, office safe, and laptop computer.

What a cell phone is not is a box or bag. Where *Belton* said that containers could be searched incident to arrest, the Court in that case imagined containers holding physical objects. But cell phones, like computers, are not storage bins for objects. What they hold is electronic data, and police can’t identify that data simply by lifting a lid and peering inside. Rather, to access the data, it must be manipulated. Buttons must be pressed, perhaps passwords entered. The search is more intrusive than lifting a lid or pulling a zipper, likely to reveal more than people

want and reasonably expect will be private. Not coincidentally, a full search of a cellular phone is best done by those knowledgeable of computer technology and at a desk with computer at hand, not at the scene of an arrest. But, of course, searching the phone properly requires a warrant, which requires probable cause.

The courts routinely express a preference for searches conducted pursuant to warrant. “[W]e have expressed a strong preference for warrants and declared that “in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall.” *United States v. Ventresca*, 380 U.S. 102, 106 (1965). As Justice Souter has recognized, that preference is reflected in the allocation of burdens when challenging Fourth Amendment violations. If the search was conducted pursuant to warrant, the burden is on the defendant; with a warrantless search, the burden is on the state. See *Illinois v. McArthur* (2000), 531 U.S. 326, 338 (Souter, J., concurring) (citing 5 LaFare, Search and Seizure (3 Ed., 1996) 38, Section 11.2(b)). This Court applies just that burden shifting. *Xenia v. Wallace* (1988), 37 Ohio St.3d 216, paragraph two of the syllabus.

What these general principles teach is that the scope of a warrantless intrusion should be limited to its justification and balanced against its invasiveness.

The exception to the warrant requirement for searches incident to arrest was not created to provide police a means to evade the warrant requirement. It was, rather, justified by “the need ‘to remove any weapons that [the arrestee] might seek to use in order to resist arrest or effect his escape’ and the need to prevent the concealment or destruction of evidence.” *Belton*, *supra*, at 457, citing and quoting *Chimel v. California* (1969), 395 U.S. 752, 763. Those needs are perfectly accounted for by the seizure of a cell phone as an incident of a lawful custodial arrest. Once the phone has been seized, there can be only two possible reasons for searching the phone

without a warrant: (1) police have no probable cause to search; (2) police don't believe the Warrant Clause matters. Neither can justify a warrantless search. Indeed, each militates against authorizing it and in favor of suppression.

Nor can the search be justified as only a de minimis invasion of reasonable privacy interests. Again, the wealth of information commonly found on cell phones, much of it often highly personal and confidential and subject to serious abuse if made public, is relevant. So is the very nature of the item. Whatever else a cellular phone is, it is quintessentially a telephone. We expect that our phones are private. We understand that the government may not listen to our phone calls without a warrant. *E.g., Katz v. United States* (1967), 389 U.S. 347. And while installation and use of a pen register at a remote location does not require a warrant, that is fundamentally because the use of a pen register is not a search at all within the meaning of the Fourth Amendment. *Smith v. Maryland* (1979) 442 U.S. 735.

CONCLUSION

Cellular phones are unique devices, more like laptop computers than like traditional telephones or portable devices such as pagers. They contain, often, confidential and personal information that everyone understands and expects to be private. Nor are cellular phones like boxes or bags, containers which can simply be opened to reveal the physical objects they may contain. It follows that owners of cellular phones have reasonable expectations of privacy in their contents. Because the invasion of that expectation cannot be justified by the mere fact that the cellular phone was seized incident to a lawful arrest, police who seize a cellular phone during an incident search may not search it without first obtaining a warrant.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing were sent by regular U.S. mail, postage prepaid, to

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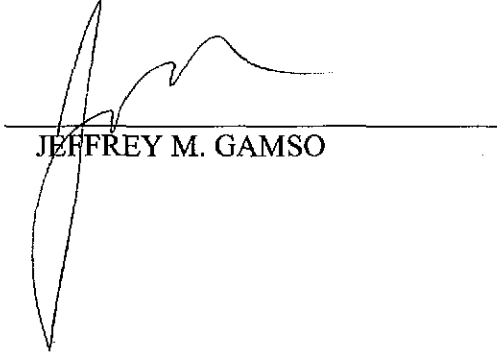
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This 13th Day of April, 2009.



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