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INSIDE

CELL PHONE SEARCHES IN LIGHT OF RILEY

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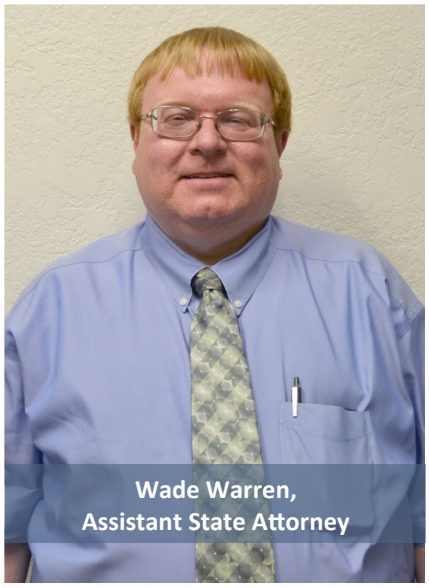
CELL PHONE SEARCHES IN LIGHT OF RILEY

Wade Warren, Assistant State Attorney

Currently an issue is pending before Congress and the Courts relating to the search of an Apple iPhone. Felony Intake also receives frequent calls concerning law enforcement's desires to search a particular cell phone. So this is probably a good time to look at the case law over the last few years relating to that subject.

The United States Supreme Court has answered some of the most important questions in *Riley v. California*, 134 S. Ct. 2473 (2014) which we will discuss at length shortly. Since we operate in Florida, however, we should also be familiar with the decisions of our own state. A little over a year prior to *Riley* the Florida Supreme Court addressed the same issue in *Smallwood v. State*, 113 So. 3d 724, 726 (Fla. 2013). That decision involved a robbery defendant whose cell phone was seized and searched without a warrant. The Court reviewed by looking at several longstanding tenets of constitutional law:


Wade Warren,
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[T]he most basic constitutional rule in this area is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." The exceptions are "jealously and carefully drawn," and there must be "a showing by those who seek exemption ... that the exigencies of the situation made that course imperative." "[T]he burden is on those seeking the exemption to show the need for it."

Coolidge v. New Hampshire, 403 U.S. 443 (1971)

…….

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

Fla. Const. art. I, § 12

(Note the protections under the Florida Constitution are more expansive than the Fourth Amendment)

In light of those protections the Court decided that due to the vast amount of information, including highly personal data, contained in modern cell phones that allowing a search without a warrant is "akin to providing law enforcement with a key to access the home of the arrestee." The court acknowledged that some applications could even be used to view webcams at a person's home. They decided a search of that potential pervasiveness required a warrant.

Riley was decided in June of 2014 by the United States Supreme Court, resolved the various, and sometimes contradictory, court decisions across the country dealing with cell phone searches. In what is an increasing rarity these days, it was a decision with no dissenting justices. Viewing the Fourth Amendment, which makes clear that "unreasonable" searches and seizures are prohibited, it pondered whether there was a "reasonable" exception to the warrant requirement for cellphones. It first looked at *Chimel* from 1969 which created the groundwork for warrantless searches incident to arrest. There the Court determined that the area within an arrestee's immediate control could be searched for weapons for the officer's safety or for evidence to prevent its destruction. In 1973, the court revisited the issue in *Robinson* and determined that while the authority to search incident to arrest was based on the safety and preservation of evidence, it was not required that those factors be implicated to conduct the search. Finally the Court saw that *Gant* from 2008 limited the ability to search a vehicle incident to arrest unless the arrestee was unsecured and within reaching distance of the passenger compartment, or when it was reasonable to believe that evidence relative to the crime for which the arrest was based would be present in the vehicle.

The Court then looked at a balancing test between the intrusion on an individual's privacy, and the degree to which a warrant exemption was needed to promote a legitimate governmental interest. They noted that while the privacy interest of a person is diminished during an arrest, cell phones by the nature of their vast and comprehensive personal

information was far more intensive than the brief physical search from *Robinson*. They also stated that digital data itself did not offer a threat of harm to an officer's safety. (Although you can still search the physical phone itself for weapons). As far as destruction of evidence while there is the remote danger of remote wiping or the presence of data encryption, the Court determined that the danger of either was slight and that they could be prevented by the simple preventative of removing the battery or placing the device in a Faraday bag. The Court does suggest that if a phone is located in an unlocked state, that officers might be able to turn off the unlock feature under the same analysis that allows them to secure a scene to preserve evidence while a warrant is acquired.

The Court also explored a variety of ways that modern cell phones were materially distinguishable from other personal effects both quantitatively and qualitatively. Cellphones are actually minicomputers that can also be used as a phone. They incorporate the functions of a variety of other items such as cameras, albums, rolodexes, diaries, and calendars to name a few. A person would need to haul a trunk around with them to approach the vast amount of personal data located in a single cell phone. Their immense storage capacity (which is continually increasing) can reveal more in combination than any single physical source of records. A person's life history could be reconstructed more readily with the data on a cell phone that an exhaustive search of the person's home. The data that can be viewed may not even be in the cell phone itself as much information is stored on the cloud and may be on a remote server located any where in the world.

The Court stated that it realized its decision would impact the ability of law enforcement to combat crime. They accepted that this was the cost to protect privacy interests of individuals. It should be acknowledged that the Court specifically rejected the notion that officers should always be able to view the call log without a warrant. They also made clear that they were not making cell phones immune to search, but that either exigent circumstances or a warrant would be required in order to do so. While the Court made allowances for exigent circumstances, it must be understood that the reasonableness of the exigent search will be reviewed by a court later on. If it is determined that the search was unreasonable the evidence and its fruits will be suppressed.

Hanifan v. State, 177 So. 3d 277, 280 (Fla. Dist. Ct. App. 2015) was a Second District case from September of 2015. It gives a good example of some of *Smallwood* and *Riley*'s principles put into play. Police investigators were contacted by a trooper in Massachusetts advising them that Hanifan had transmitted child pornography to a defendant in Massachusetts. The police then spoke to Hanifan's wife and received descriptions of the suspect and his vehicle. She also advised that he had a smartphone in a black protective case. After checking with Massachusetts they learned the smartphone was direct implicated in the criminal activity.

They went to Hanifan's house, but no one was currently home. While waiting in a neighbor's driveway they then saw Hanifan in his vehicle driving toward the house. He almost came to a stop at the driveway and then sped away. As the detectives pursued him he ran through two intersections. When they eventually stopped him they seized the smartphone which was on the passenger floorboard. They then obtained a warrant to search the smartphone which revealed images of child pornography.

The Second DCA noted that while a warrant is required ordinarily prior to seizing personal effects; in this case preservation of the evidence provided justification for the seizure. Having already been apprised of the smartphone's connection to criminal activity and then observing his efforts to elude law enforcement, the detectives had a reasonable concern that he might delete information or conceal the phone. It was okay for them to temporarily retain custody of the phone while a warrant was obtained.

The take away from these cases is that the information found in cell phones possesses the kind of heightened privacy interest that is typically found in a person's home. Before seizing a cell phone the officer should be able to articulate the type of evidence that they reasonably believe the phone will contain. Once the phone is temporarily seized, a warrant based on probable cause should immediately be sought in order to examine the information contained therein. While exigent circumstances might justify a warrantless search those will need to be addressed in a case by case basis, with the understanding that if the court determines the search was unreasonable under the circumstances, the evidence gleaned may be inadmissible.

As always, we in Felony Intake are available to take your calls at the officer or at our after hours numbers to help you address concerns in specific cases.

FROM THE COURTS...

SEARCH AND SEIZURE – WARRANT -- RESIDENCE

Deputies obtained a search warrant for a shed, backyard, vehicles on the property and a residence, even though the only evidence of drug use was from the shed. The probable cause affidavit contained no facts which would support a basis for searching the residence. The defendant filed a motion to suppress drugs found in the residence. The trial court denied the motion to suppress, but the Second District reversed and held that the drugs found in the residence should be suppressed. The court reasoned that the mere proximity to the shed did not support a search of the residence. *Coronado v. State*, 39 Fla. L. Weekly D2113b (Fla. 2d DCA October 8, 2014).

BATTERY ON VICTIM 65 YEARS OR OLDER – INSUFFICIENT EVIDENCE IMPROPER EXCLUSION OF EVIDENCE BY THE COURT

In a trial for home invasion robbery, sexual battery and battery on a person 65 years or older, the conviction for battery on a person 65 or older was reversed because of the failure of the prosecution to present evidence on the age of the victim. The Second District Court held that the required statutory element must be established in order to increase the battery from a misdemeanor to a felony. The court noted that circumstantial evidence, such as someone testifying as to the victim's appearance, or evidence of dates of marriage or ages of children could be sufficient to prove the age element. *McMichael v. State*, 39 Fla. L. Weekly D2581b (Fla. 2nd DCA December 12, 2014).

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