

Recent Case Report

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People v. Diaz

(2011) __ Cal.4th __ [2011 WL 6158]

Issue

May officers search an arrestee's cell phone as an incident to the arrest?

Facts

After arresting Diaz for conspiracy to distribute ecstasy, a Ventura County sheriff's deputy took him to the sheriff's station where he removed a cell phone from his possession and questioned him about the crime. The interview ended when Diaz denied involvement. A short time later, the deputy examined the cell phone's text message folder and saw a message that read "6 4 80." Based on his training and experience, he believed the message meant "six pills of Ecstasy for \$80." So he recontacted Diaz and confronted him with the message, at which point Diaz confessed. When Diaz's motions to suppress the text message and confession were denied, he pled guilty.

Discussion

It is apparently now the law that officers who have arrested a suspect may, as an incident to the arrest, search only those things that were in his immediate control when the search occurred.¹ Even so, there is a related rule that officers may search property that was not within the arrestee's immediate control if it was the type of property that was "immediately associated" with the person of the arrestee.²

Consequently, because Diaz had no control over his cell phone when it was searched, the deputy's inspection of his text messages would have constituted an illegal search if cell phones were viewed as ordinary containers (such as vehicles³ or footlockers⁴); but it would have been legal if they fell within the category of things that are "closely associated" with the arrestee's person (such as clothing, a wallet, or a package of cigarettes⁵). And so the issue before the California Supreme Court in *Diaz* was how cell phones should be classified.

Diaz argued that cell phones are not immediately associated with the arrestee's person because they are not routinely "attached" to the body, like clothing. But the court rejected that argument, pointing out that the U.S. Supreme Court has ruled that the "character" of the item searched is irrelevant if the arrestee was, in fact, carrying it on his person. Diaz also argued that, because cell phones contain such a large amount of

¹ See *Arizona v. Gant* (2009) __ U.S. __ [129 S.Ct. 1710].

² See *United States v. Chadwick* (1977) 433 U.S. 1, 15.

³ See *New York v. Belton* (1981) 453 U.S. 454.

⁴ See *United States v. Chadwick* (1977) 433 U.S. 1, 15.

⁵ See *United States v. Edwards* (1974) 415 U.S. 800, 805; *United States v. Robinson* (1973) 414 U.S. 218.

information—much of it highly personal—the rules pertaining to their searches should be more restrictive. But the court explained that the logical basis for permitting searches of clothing and other items carried by the arrestee is the reduced expectation of privacy as to such items, not the quantity or nature of information they contain.

Accordingly, the court ruled that, because Diaz was carrying the cell phone when he was arrested, it constituted an item of personal property that was “immediately associated” with his person and, therefore, the search was lawful even though he did not have control over it when the search occurred.

Comment

The question arises: May officers search a cell phone that the arrestee was not carrying on his person, but which was in his possession when he was arrested; e.g., next to him on the seat of his car? Because this was not an issue in *Diaz*, the court did not address it. Consequently, until the matter is resolved it would be prudent for officers to seek a warrant if they believe there is probable cause.

Two other things should be noted. First, the court ruled that the U.S. Supreme Court’s opinion in *Arizona v. Gant*⁶ was not applicable to searches of cell phones. In *Gant*, the Court ruled that officers could no longer search vehicles incident to the arrest of an occupant unless the occupant had immediate access to the vehicle when the search occurred. Thus, if *Gant* was controlling, the search in *Diaz* would have been unlawful because Diaz was apparently in another room when it occurred. But the court ruled that *Gant* did not apply because its restrictions did not pertain to the category of things, such as cell phones, that are deemed “of the arrestee’s person.”⁷

Second, the question may arise whether a search can be upheld under *Diaz* if the delay between the arrest and search was longer than that approved by the U.S. Supreme Court in *U.S. v. Edwards*; i.e., ten hours. Because the justification for permitting these searches is based on the absence of a reasonable expectation of privacy in clothing and other items that are carried by the arrestee, it seems doubtful that the passage of time alone would operate to regenerate a reasonable expectation of privacy and, thus, invalidate a search. POV

⁶ (2009) __ U.S. __ [129 S.Ct. 1710].

⁷ At fn. 9.