Recent Case Report

Date posted: July 13, 2012

U.S. v. Flores-Lopez

(7th Cir. 2012) 670 F.3d 803

Issue

Must officers obtain a warrant to search an arrestee's cell phone for its phone number?

Facts

Officers in Indiana arrested Flores-Lopez after he transported a pound of methamphetamine to a garage where a sale to an undercover agent had been arranged. While searching Flores-Lopez, officers found a cell phone which they searched for its phone number. Using that information, they issued a subpoena to Flores-Lopez's cell phone provider for recent call history records. Those records revealed that the phone had been frequently used to communicate with other coconspirators. This information was used against Flores-Lopez at his trial, and he was found guilty.

Discussion

Flores-Lopez argued that the search of his cell phone was unlawful because the officers did not have a warrant. The court disagreed.

It is settled that officers who have made a lawful arrest may, as an incident to the arrest, search the arrestee for weapons in his possession and evidence pertaining to the crime.[1] Thus, the search of Flores-Lopez was plainly lawful. The issue, however, was whether the officer needed a warrant to search the cell phone's memory for its assigned phone number.

At first glance it would appear that the answer is no. After all, the Supreme Court has ruled that officers who are conducting a search of a person incident to arrest may search any containers that the arrestee was carrying. And a cell phone is just a container of information, isn't it? Technically yes, said the court, but it pointed out that there is still some question as to whether cell phones should be subject to more restrictive rules because the "potential invasion of privacy in a search of a cell phone is greater than in a search of a [conventional] container." In fact, the court observed that "[j]udges are becoming aware that a computer (and remember that a modern cell phone is a computer) is not just another purse or address book" because "[e]ven the dumbest of modern cell phones gives the user access to large stores of information."

While these are legitimate concerns, the court ruled they were not implicated here because the search was limited to obtaining only a single (and not very private) piece of information: a phone number. As it pointed out, the invasion here was "slight" and, in fact, was more akin to a patdown than a full-blown search. It then concluded that "[i]f police are entitled to open a pocket diary to copy the owner's address, they should be entitled to turn on a cell phone to learn its number."[2] Accordingly, the court ruled the search was lawful.

Comment

We decided to report on this opinion because it deals with a subject that is currently evolving and is of special interest to law enforcement; and it was written by one of the country's most respected and widely-read judges, Richard Posner of Chicago's Seventh Circuit. And, as usual, the judge's analysis and discussion were excellent.

We must, however, question one of his comments. Although he ultimately ruled that the search of the cell phone was lawful, he implied that the result might have been different if the officers had conducted a more intensive search, such as a search of its call history. While the Supreme Court has not directly addressed the issue, it ruled in *United States v. Robinson* that officers who are conducting a search incident to arrest may open and search any containers that the arrestee was carrying.[3] In fact, the Court in *Robinson* expressly rejected the idea that was suggested in *Flores-Lopez* that the scope and intensity of searches incident to arrest should be tantamount to a patdown.[4] It is, therefore, questionable whether the search of Flores-Lopez's phone would have been illegal if the officers had searched it for its call history or maybe even text messages.

It would be especially questionable in California where our Supreme Court ruled in 2011 that a cell phone is an item that is "immediately associated" with the person of an arrestee,[5] and is therefore searchable under the U.S. Supreme Court's rule that officers may search such items.[6]

Two other things should be noted. First, the court pointed out that its analysis of cell phone searches in this case applied equally to searches of laptop computers and other digital storage devices. Said the court, "Lurking behind this issue is the question whether and when a laptop or desktop computer, tablet, or other type of computer (whether called a 'computer' or not) can be searched without a warrant—for a modern cell phone *is* a computer."

Second, the U.S. Supreme Court has ruled that when officers have arrested an occupant of a vehicle for a crime in which there are usually fruits or instrumentalities (e.g., drug trafficking), they may, as an incident to the arrest, search the passenger compartment for such evidence if they have reasonable suspicion that it is inside; i.e., neither probable cause nor immediate access is required.[7] It is, therefore, arguable that when officers arrest an occupant of a vehicle who is carrying a cell phone, and when they have reasonable suspicion to believe that incriminating information pertaining to the crime for which he was arrested is stored in the phone's memory, a warrant is not required to search for such information. To our knowledge, however, no court has yet addressed this issue. POV

---

[1] See *United States v. Robinson* (1973) 414 U.S. 218.

[2] **NOTE**: The court also provided an interesting discussion of the ways in which digital data may be sabotaged.

[3] (1973) 414 U.S. 218, 236 ["Having in the course of a lawful search come upon the crumpled package of cigarettes, [the officer] was entitled to inspect it; and when his inspection revealed the heroin capsules, he was entitled to seize them as fruits, instrumentalities, or contraband probative of criminal conduct."].

[4] *Id.* at p. 228 [the Supreme Court's seminal detention case, *Terry v. Ohio* (1968) 392 US 1, 23 "therefore, affords no basis to carry over to a probable-cause arrest the limitations this Court placed on a stop-and-frisk search permissible without probable cause."].

[5] *People v. Diaz* (2011) 51 Cal.4th 84. [certiorari denied by *Diaz v. California*, 132 S.Ct. 94].

[6] *United States v. Chadwick* (1977) 433 U.S. 1, 15.

[7] *Arizona v. Gant* (2009) 556 U.S. 332, 335 ["circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle"]. ALSO SEE *People v. Nottoli* (2011) 199 Cal.App.4th 532, 554 ["When a driver is arrested for being under the influence of a controlled substance, the officers could reasonably believe that evidence relevant to that offense might be found in the vehicle."].