

# Recent Case Report

## People v. Diaz

(2008) \_\_ Cal.App.4<sup>th</sup> \_\_ [2008 WL 2908704]

### ISSUE

Can officers search an arrestee's cell phone as an incident to the arrest if the search occurred about 90 minutes after he was taken into custody?

### FACTS

Diaz was arrested by Ventura County sheriff's deputies for transporting a controlled substance. The arrest occurred after Diaz drove another man to a location where the man sold Ecstasy pills to a police informant during a controlled buy. About an hour later at the sheriff's station, deputies seized a cell phone Diaz had been carrying. About 30 minutes later, a deputy searched the text message folder in the cell phone and found a message indicating that Diaz was selling the drug. When confronted with this information, Diaz confessed.

### DISCUSSION

Diaz argued that the text message was obtained as the result of an illegal search. Consequently, he contended that his confession, as well as the text message, should have been suppressed as the fruit of the search. The court disagreed.

It is settled that officers who have arrested a suspect may, as an incident to the arrest, search the property in his immediate control.<sup>1</sup> These types of searches, however, must be conducted contemporaneously with the arrest, which generally means they must occur at or near the time of arrest.<sup>2</sup> Thus, Diaz argued that the search of his cell phone did not qualify as a search incident to his arrest because it occurred about 90 minutes after he was arrested.

There is, however, an exception to this rule. A search of personal property need not be contemporaneous with an arrest if the property was of the type that is "immediately associated with the person of the arrestee."<sup>3</sup> Items falling into this category include wallets, purses, address books, and pagers.<sup>4</sup>

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<sup>1</sup> See *U.S. v. Robinson* (1973) 414 U.S. 218, 224; *People v. Harris* (1980) 105 Cal.App.3d 204, 213 ["It is a well established principle deeply ingrained in our criminal law that an arrested person and his belongings may be searched without a warrant both as incident to the arrest."].

<sup>2</sup> See *Shipley v. California* (1969) 395 U.S. 818, 820; *Vale v. Louisiana* (1970) 399 U.S. 30, 33; *U.S. v. McLaughlin* (9<sup>th</sup> Cir. 1999) 170 F.3d 889, 892 ["There is no fixed outer limit for the number of minutes that may pass between an arrest and a valid, warrantless search that is a contemporaneous incident of the arrest. Instead, courts have employed flexible standards such as 'roughly contemporaneous with the arrest,' and within a reasonable time after obtaining control of the object of the search."].

<sup>3</sup> See *U.S. v. Chadwick* (1977) 433 U.S. 1, 15; *U.S. v. Edwards* (1974) 415 U.S. 800.

<sup>4</sup> See *People v. Decker* (1986) 176 Cal.App.3d 1247, 1252; *U.S. v. Passaro* (9<sup>th</sup> Cir. 1980) 624 F.2d 938, 944; *U.S. v. Rodriguez* (7<sup>th</sup> Cir. 1993) 995 F.2d 776, 777-9; *U.S. v. Chan* (N.D. Cal. 1993) 830 F.Supp. 531, 536.

Diaz argued that cell phones should not be included because, like computers, they “have the capacity to store tremendous quantities of personal information.” Although that is true, said the court, it “does not give rise to a legitimate heightened expectation of privacy where, as here, the defendant is subject to a lawful arrest while carrying the device on his person.”

Accordingly, because Diaz was carrying the phone when he was arrested, and because it was “immediately associated with his person” at the time of the arrest, the court ruled it could be searched “for a reasonable amount of time following the arrest.” It also ruled that 90 minutes was not an excessive amount of time and, therefore, the search was lawful. POV