The Warrantless Search of Cellular Phone Technology

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With the increasing reliance on cellular telephones, the technology has become more commonly encountered during arrests and crime scene investigations. The current work seeks to examine how the courts have ruled in regards to the search of cellular technologies without a search warrant. The author examined recent U. S. federal and case court decisions to ascertain judicial trends toward warrantless searches of cellular technology. The current case analysis revealed that the courts have extended warrantless search doctrines to the realm of cellular technologies, most notably to include the consent doctrine and the search incident to arrest doctrine. The results of this case analysis support the argument that while seizures of cellular technologies could be justified under one of the accepted exceptions to the warrant requirement, a thorough search should be carried out in accordance with a search warrant whenever possible.

Key Words: Search and seizure • cellular technology • search incident to arrest • warrantless searches • technology

Recent media reports argue that as many as 6 out of 10 individuals in the world use a cellular phone in their daily lives (Jordan, 2009). If these numbers are correct, then there is a justifiable concern that law enforcement officers conducting criminal investigations will encounter the technological devices with greater frequency. Some criminal investigators have already begun recognizing the evidentiary value of a cellular telephone and have begun using devices that withdraw data from cellular telephones (Tonsing, 2008). However, the evidentiary value of today’s cellular telephones may yet be fully realized. Modern cellular telephones are far more powerful than their predecessors, leading to a situation where one could even consider a cellular telephone as more akin to a computer than a telephone. An individual who purchases a cellular telephone today is capable not only of making telephone calls, but also of transmitting text messages, sending e-mails, taking pictures, recording videos, and even surfing the Internet.

If the cellular telephone of today can be considered more of a computer than a telephone, then the question becomes one of whether traditional search doctrines applied to computers should apply to the search of cellular telephones. The courts have ruled

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consistently in the past that computers may be seized without a search warrant but have generally ruled that searches of its contents should be conducted pursuant to a valid search warrant (State v. Rupnick, 2005; United States v. Barth, 1998). If the computer and cellular telephone of today are in fact the same technology and maintain the same capabilities, it would seem that owners of cellular telephones should maintain the same expectations of privacy in their cellular telephones that they maintain in their personal computers. However, there is also the possibility that the mobility and the volatility of the data stored within a cellular telephone could lead the courts to redefine such an expectation of privacy, leading to scenarios where searches and seizures of cellular technology could be justified absent a well-drafted search warrant.

As of this writing few academic or practical guides have been written to address questions such as those mentioned above. The current study attempts to fill a gap in the current literature through the examination of recent state and federal court decisions dealing with the issue of searching cellular technologies. This analysis is done with the intention of better understanding current procedures in use, as well as providing an insight into where the courts may head with their judicial decisions concerning searches of cellular technologies. More specifically, this work attempts to provide an introductory level of guidance into an emerging area of warrantless search doctrine. Before attempting to understand how the courts have ruled in regards to searches and seizures of cellular technologies, it is important to examine briefly how the courts have ruled in regards to warrantless searches of computer technology in general before moving to cellular telephones specifically.

Evolution of Search and Seizure Doctrines Involving Computer Technology

The Fourth Amendment of the United States Constitution states that citizens will be free from unreasonable searches and seizures. One method of ensuring that a search is deemed reasonable is for law enforcement officers to conduct their searches under the authority of a valid, well-drafted search warrant. However, the United States Supreme Court has determined that searches may take place without a search warrant and still be deemed reasonable, although such situations should be limited (Katz v. United States, 1967). These warrantless search doctrines generally involve situations where evidence can be destroyed easily or where officer safety dictates that a warrantless search is necessary to prevent harm to the officers or citizens present (Chimel v. California, 1969; United States v. Robinson, 1973). The warrantless search doctrines that are most often encountered when considering computer technologies are: 1) search incident to an arrest—a search may be completed without a warrant after a lawful arrest has been made (Preston v. United States, 1964), and 2) consent search—a search whereby officers get
the permission of the property's owner or controller to examine an area (Boyd v. United States, 1886).

Search Incident to an Arrest
The search incident to arrest doctrine may be the most commonly encountered warrantless search doctrine, resulting in searches that come from a contemporaneous search after a lawful arrest (United States v. Moorehead, 1995). In United States v. Robinson (1973) the Supreme Court ruled that officer safety allows for a search of not just the individual under arrest but also the immediate area under the control of the arrestee. This is done to 1) protect the officer involved in the arrest, and 2) prevent the destruction or loss of any contraband within the area of the arrest. In United States v. Tank (2000) the Ninth Circuit was asked to consider whether the search incident to arrest doctrine could be applied to the search of a computer disk. Following a lawful arrest, officers seized a zip disk from the immediate area of the arrestee’s control. A zip disk was an early form of high-capacity data disk that allowed for storage of 100 to 250 megabytes (MB) of data (Khurshudov, 2001), a significant amount of data at the time of Tank’s arrest. The Ninth Circuit upheld the warrantless search of the disk on the basis that it was seized contemporaneous with the suspect’s arrest.

While the Ninth Circuit ruled that the search and the seizure of the computer disk were acceptable given the lawful arrest, it should be noted that the computer disk seized by officers was relatively small in comparison with today’s data storage devices. Today an individual may have a flash drive, also occasionally referred to as a thumb drive because of its very small design, that may contain up to 64 gigabytes (GB) of data, roughly 256 times more data than the disk recovered by officers in the Tank case. Most traditional contraband searches that have been conducted incident to arrest have involved relatively quick searches of an area such as the front seat of an automobile or a purse recovered from an arrestee. When considering the size of data storage devices today, it is possible that a court would rule that the significant investment of time, as well as the computer forensics software possibly required, would move the search well beyond that which could be considered contemporaneous with the arrest.

It is for these reasons that this author recommends that searches of computer disks today be conducted pursuant to a valid search warrant. Use of the search incident to arrest doctrine should be sufficient to justify the seizure of the storage device, but once an officer has possession of the data device, a search warrant would be advisable. This recommendation is due to the author’s belief that the search incident to arrest doctrine and the authority to conduct seizures under the doctrine are closely related to the concept of exigent circumstances. Some scholars have attempted to argue that traditionally the

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courts have allowed for officers to conduct lengthy paper-based searches incident to arrest and as such would likely extend the same attitude toward searches of technological devices (Middleton, 2002). While this may or may not be the case, law enforcement officers should have no problem articulating that the seizure of a disk protected the loss of potential evidentiary data; however, once the disk or storage medium is in the hands of law enforcement, the exigency of the situation may begin to dissipate (United States v. David, 1991). Therefore, extensive searches of a computer technology should, whenever possible, be conducted pursuant to a valid search warrant.

Moving from computer disks to telephone-related technologies takes us to a case in which the court considered the search and seizure of a pager to be justifiable under the search incident to arrest doctrine. In United States v. Chan (1993) a California District court found that under normal circumstances activating a pager could be considered an unreasonable search if there was not a valid warrant authorizing the search. However, in the case at hand, the court found that Chan’s arguments were invalid because the search of the pager was conducted pursuant to a valid search incident to an arrest. Other courts have ruled along similar lines, addressing the concept of exigency when providing discussion on their decisions (United States v. Lynch, 1995; United States v. Ortiz, 1996). Today fewer people are known to use a pager, but the precedent set by the Chan decision is important because it indicates a willingness on the part of judges to extend previous court rulings dealing with the warrantless search of closed containers within a vehicle to the search of electronic storage items retrieved during a search of a vehicle.

Consent
An individual may at any time consent to a warrantless search involving a home, a vehicle, a computer, or any other property. This consent must, however, be freely given and not be a result of duress or coercion. Further, the individual needs to understand what he or she is consenting to, although the individual need not be informed that he or she has the right to refuse consent (Schneckloth v. Bustamonte, 1973). In regards to searches of technological devices, it becomes important for officers to ensure that their requests to a consent search be particular in regard to what items the search entails. Consider that in United States v. Blas (1990) a Wisconsin court found that a consent search involving a pager was invalid after the officer asked to “examine” the pager. It was the court’s opinion that the officer’s request to examine the pager could have been inferred to mean that the officer was only going to look at the outside of the device. As such the warrantless search of the internal memory of the device was invalid under the consent exception. Along similar lines a search of a computer off-site was not justified under the consent exception when a subject granted consent to search and seize any property “in his house” (United
States v. Carey, 1999). Decisions such as the aforementioned show that consent searches, while they may be clear to the law enforcement officer on the scene, may on second examination be considered ambiguous to others.

Another potential risk with using a warrantless consent search is the fact that consent may be withdrawn at any time and such withdrawal of consent may take the form of many different actions. Consider the following state court opinions in Florida that have found consent may be revoked by: 1) verbally withdrawing consent (State v. Hammonds, 1990), 2) an act such as grabbing an officer’s hand to stop the search of a particular area (Jimenez v. State, 1994), or 3) the fleeing of a subject from the scene during a search (Davis v. State, 1986). With this in mind it is perhaps better to conduct consent searches under the guidance of a written agreement detailing exactly what areas may be searched and what items may be seized.

Exigent Circumstances
Any discussion of warrantless search doctrines would be incomplete without at least a cursory examination of the issue of exigent circumstances. The claim of exigent circumstances has been used to justify searches where taking the time to secure a search warrant would likely result in the removal or even destruction of evidence (United States v. Reed, 1991). The case of United States v. David (1991) focuses on law enforcement officers’ seizure of a suspect’s electronic data device without a search warrant. An officer was standing behind the subject and noticed the subject appear to delete contacts from the address book of the data device. The officer, fearing for the loss of evidence, seized the data book and began an examination of the contents of the device. The court agreed that exigency justified the seizure of the data device but also claimed that the exigency ended when the seizure took place. As such a valid search warrant should have been drafted for the contents of the data device.

In a separate scenario, more closely related to cellular technologies, the warrantless seizure and search of a pager was held to be valid. In United States v. Ortiz (1996) officers seized a pager and retrieved a list of phone numbers that was recorded and used as evidence. The officers claimed that exigent circumstances was a valid justification to the seizure because there was a significant possibility that the evidence would have been lost had the officers not obtained the numbers when they did so. The court agreed, finding that the numbers in a pager could be easily lost or deleted should the batteries die.

However, when the loss of battery power will not affect memory then at least one court has failed to recognize the exigent circumstances exception (United States v. Romero-Garcia, 1997). In Romero-Garcia officers conducted a search of a battery operated computer. The court found that the officers’ arguments that the data within the device
could be lost should the batteries die was not a valid consideration. It was the opinion of the court that, unlike pagers, a computer will not lose its memory when the batteries die or the device is powered down. As such, the warrantless seizure of the device may be justified, but the search should be conducted pursuant to a valid search warrant.

The Warrantless Search of Cellular Phones

The state and federal courts have begun to address searches of cellular telephones with and without a search warrant; however, the bulk of these cases have addressed warrantless searches pursuant to the search incident to arrest doctrine. During the course of addressing the search incident to arrest doctrine, the courts have alluded to various other warrantless search doctrines, one such doctrine being the plain view exception to the search warrant requirement. In Arizona v. Hicks (1987) the United States Supreme Court ruled that officers who are in a place where they have a lawful right to be and observe contraband may seize the contraband absent a search warrant. In addressing searches of pagers and cellular telephones, the courts have ruled that warrantless seizures and searches may, in limited cases, be valid searches absent a search warrant (State v. Carr-Poindexter, 2005; United States v. Santillan, 2008).

Search Incident to an Arrest

Just as in cases of search incident to arrest involving pagers and personal data assistants, the application of the doctrine to the search of cellular telephones has resulted in mixed decisions. For the courts that have ruled on the acceptance of the warrantless search doctrine, the issue has been the protection of officers and the need to prevent destruction of evidence. For the courts that have ruled against the use of this doctrine, one of the primary issues has been whether the search was contemporaneous with the arrest.

In United States v. Ball (2005) a Missouri district court was asked to consider whether a search of a cell phone recovered from a vehicle and searched after the vehicle was moved to a secure location was valid. The court found that such a search was justified on the basis of the officers’ testimony that narcotics were recovered in the vehicle and the officers testified that based upon their training and experience, narcotics transactions are sometimes conducted by using cellular telephones. The fact that the search was not conducted at the scene of the vehicle’s stop and seizure did not invalidate the search incident to arrest claim, as the court believed that a totality of the circumstances must be considered and a search need not be conducted immediately upon arrest to be considered contemporaneous.
Another, more often cited case, is that of *United States v. Finley* (2007). Here, the Fifth Circuit Court of Appeals was asked to consider whether a search conducted after a valid arrest and after transporting the arrestee to a co-defendant's residence could be considered contemporaneous with the arrest. In the *Finley* case, the defendant was arrested after a traffic stop conducted pursuant to a controlled purchase of methamphetamine. After arresting Finley and another co-defendant, officers seized Finley's cellular telephone and then transported both arrestees to the co-defendant's residence where a search with warrant was being conducted.

Once at the residence, officers searched the cellular telephone and found several messages related to narcotics trafficking. Confronted with this evidence, Finley then confessed to the trafficking of marijuana. On appeal Finley challenged the search of the cellular telephone, claiming that the seizure was lawful, but the search was illegal. The court disagreed, finding that the search and the seizure were lawful. In addressing the issue of whether the search was contemporaneous with the arrest, it was the opinion of the court that a search need not take place right after the seizure to be a valid search incident to an arrest. In determining how long after arrest the search may occur, the court stated that until all processes related to arrest and booking are completed, a search could be considered contemporaneous.

On the other side of this issue is the decision of *United States v. Park* (2007). In question in the *Park* decision was whether a search of a cellular telephone, seized during the execution of a search warrant, was a search incident to arrest when the search did not occur until hours later while the subject was being booked into the department's holding facility. It was the officer's contention that searches of cellular telephones are searchable incident to arrest and that a regular booking procedure involves the investigation of cellular telephones. The California district court, however, disagreed, finding that searches incident to arrest are done to protect officers and to prevent destruction of evidence; as such the searches should occur at the time of the arrest and not hours later (*United States v. Hudson*, 1996).

A Hawaiian District court further addressed the issue of searches incident to arrest in relation to booking searches in the case of *United States v. LaSalle* (2007). At issue in the *LaSalle* case was a search incident to arrest where the defendant was arrested pursuant to a valid search warrant dealing with a controlled delivery of narcotics. The search of LaSalle took place approximately four (4) hours after the arrest but before the completion of the booking process. The search of two (2) cellular telephones belonging to LaSalle took place as an officer was completing the booking process. It was the opinion of the court that searches incident to arrest should take place within minutes of the arrest. In reaching its decision the court referred to several previous cases where searches incident
to arrest were held to be valid when the searches took place within fifteen to twenty minutes (United States v. Hudson, 1996; United States v. Weaver, 2006; United States v. McLaughlin, 1999) but were held to be invalid when the searches occurred thirty minutes or more after the arrest (United States v. Turner, 1991; United States v. Vasey, 1987). The variance in these court opinions provides proof that while the state and federal courts may have extended the search incident to arrest doctrine to include searches as well as seizures of cellular telephones, there is still ongoing debates concerning what is exactly meant by the term “contemporaneous.”

Consent
The state and federal courts have also begun addressing warrantless searches of technology under a consent decree. It is important to note that before one may grant law enforcement officers consent to a search, it must be shown that the individual granting consent has common authority over the area in which the search will take place (Illinois v. Rodriguez, 1990); however, “authority” does not mean the subject has to have common ownership (United States v. Meador, 2008). In the Meador case a Missouri District court was asked to consider whether a defendant’s mother could grant consent to search a vehicle that was driven by the defendant and owned by the defendant’s parents. It was the opinion of the court that because the vehicle was owned by the father and the authorities reasonably believed the mother to be a co-owner, the consent to search the vehicle was valid. The court did note, however, that ownership was not a required component, and authority could be granted through use of property.

The Meador case, while not directly addressing the search of a cellular telephone under a consent agreement, may still prove beneficial to understanding such searches. In Meador, the defendant objected to the search of a cellular telephone that was recovered from the vehicle that his mother granted law enforcement officers consent to search. The officers searched the cellular phone on the basis of 1) the mother’s consent to search the vehicle and 2) evidence of marijuana possession, a component of the officers’ case against the defendant. It was the opinion of the court that the mother’s consent to search the vehicle justified the seizure of the cellular phone and that once inside the vehicle, the automobile exception superseded the consent requirement for a warrantless search. As such, the discovery of even a small amount of marijuana and the knowledge that cellular telephones are tools commonly used in the distribution of narcotics was sufficient probable cause to justify the search absent a search warrant.

In regards to consent searches directly involving cellular telephones, it would appear that the courts have ruled that consent alone is sufficient to justify a warrantless search—much as anyone who has studied the consent exception would expect. However,
law enforcement officers who rely on consent to search a cellular telephone must ensure that those giving consent have a clear understanding of what the law enforcement officer intends to search for and where the search will take place. Because cellular telephones can store such vast amounts, as well as different formats, of evidence, it is important that the individual granting consent be fully aware of what exactly he or she is consenting to during the search. While an officer is not required to inform a subject of his or her right to refuse consent (Schneckloth v. Bustamonte, 1973), it is in the best interest of the officer and the search outcome that a person granting consent understands what the search will entail.

At least one court has ruled that a consent search involving a request to search a vehicle for evidence of narcotics, guns, or money may not extend to a search of a cellular telephone recovered within the vehicle (Murphy, 1999). In the case of Smith v. Indiana (1999) the court found that a request to search for narcotics would have allowed for the opening of the cellular telephone’s casing to ensure that no narcotics were within the phone; however, powering on the cellular telephone and searching numbers or addresses would have exceeded the consent. The rationale in this decision is very similar to that of United States v. Blas (1990), whereby the individual granting consent to “look” at a pager only meant for that consent to cover examining the exterior of the device. These two cases demonstrate that while it may seem ridiculous to explain exactly what will happen during the course of a search of a cellular device, such explanations may be important to ensure that the search is later deemed valid.

In United States v. Jones (2007) a Pennsylvania District court found that consent to search a cellular telephone was sufficient to justify a warrantless examination of the memory of the cellular telephone. Further, the court found that the subject’s accessing the cellular telephone and going so far as to explain the various numbers and names in the memory of the telephone was admissible as further proof of the individual’s consent to search the cellular telephone. This consideration became necessary after the defendant denied that he had granted consent to search the cellular telephone. Ultimately, however, the believability of such arguments is often left to the trial court to consider. In much the same manner as Miranda warnings now routinely involve signatures on forms stating that a defendant understands that he or she has a right to remain silent and not provide a statement, it may be a wise idea for officers to use consent to search documents to ensure that the person signing the form 1) understands what he or she is consenting to during the search and 2) cannot later deny his or her initial consent—although he or she may still revoke consent at any time during the course of a search.
Possible Future Implications Involving Cellular Phone Searches

With the constantly increasing capabilities of cellular telephones, it is only a matter of time before the cellular telephone will have most, if not all, of the capabilities of laptop computers. For proof of this statement one only has to look at the recent developments from Apple and the release of their iPhone. The iPhone has the normal capabilities of a cellular telephone but also has thousands of applications users can download and install, ranging from games to productivity software, that allow users to receive, modify, and send documents, images, and videos (Gershowitz, 2008). Other cellular technology firms have begun offering their cellular telephones with operating systems such as the Windows Mobile Operating System, moving one step closer to making a cellular telephone a Windows-based personal computer.

It is for this reason that this author recommends that law enforcement officers who deal with the search and seizure of cellular telephones approach such searches with caution. While the state and federal courts have ruled that consent and search incident to arrest are valid warrantless search exceptions when dealing with cellular telephones, each is still fraught with potential danger. Consent searches in and of themselves are risky due to the fact that consent can be withdrawn at any time before or during the search, and this is true even if the individual granting consent has signed an informed consent document. Search incident to arrest is perhaps the more appropriate and safer warrantless approach to searching cellular technologies; however, one must consider that the courts have yet to agree on a definition of “contemporaneous” and have yet to agree on the limits of searches conducted incident to arrest. Some courts have ruled that anything within the cellular telephone may be searched, while others have argued that searches of cellular telephones should be limited to items that could potentially be destroyed or lost (i.e. call logs, text messages, etc.).

Also of interest will be how the state and federal courts reapply the search incident to arrest doctrine in light of the recent decision of Arizona v. Gant (2009), where the United States Supreme Court ruled that the search of a vehicle incident to arrest was unconstitutional when the officer(s) could not reasonably foresee that the arrestee could gain access to the vehicle and any weapons or evidence. An additional consideration in the Gant decision was whether the search incident to arrest would reveal evidence of the crime for which the subject was arrested. In regards to searches of cellular technology, it will be interesting to see whether the courts will continue to allow warrantless searches of cellular telephones in cases where officers can articulate the possible presence of criminal activity and evidence such as evidence of narcotics activity where cellular devices have been successfully linked in past court decisions.
Each of these considerations is certain to see increased coverage in future decisions as cellular telephones add software applications that make the cellular telephone more than just a telephone. As in all areas of criminal investigation, situations will call for the warrantless search and seizure of a cellular telephone. Law enforcement officers are encouraged to proceed carefully when conducting such operations. If a law enforcement officer has probable cause to believe that a cellular telephone contains evidence of criminal activity, then the safest method may be to seize the phone under one of the warrantless seizure doctrines and then obtain a valid search warrant for the subsequent search of the device’s contents. The majority of courts, while varying in their acceptance of detailed searches of technological devices absent a search warrant, have agreed that the seizure of cellular technologies may be made without a search warrant. In this manner law enforcement officers are more likely to ensure that their evidence is properly seized and searched, thereby insuring that the evidence is more likely to be considered admissible should the case go to trial.

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