

## 11-04: Search of Cell Phone Incident to Arrest

**Case:** Smallwood v. State, 36 FLW D911b (Fla. 1st DCA)

**Date:** April 29, 2011

**Subject:** Search of defendant's cell phone incident to his arrest was lawful, even though there was no reason to believe that the phone contained evidence of the crime for which he was arrested. (Question certified to Florida Supreme Court.)

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**FACTS:** Smallwood was arrested for armed robbery. At the time of his arrest, he was in possession of a cell phone. Even though there was nothing at the time which would have led the officer to reasonably conclude that the phone contained evidence related to the robbery, the officer testified at deposition that he looked at stored pictures on the phone "to see if (Smallwood) took any pictures" that would "relate to the crime" because the officer "knew people sometimes do that." In fact, the phone did contain pictures of the stolen money, a firearm, and other images which were admitted against the defendant at trial, and he was convicted. Smallwood appealed, arguing that the search of his phone, without a warrant and with no probable cause, constituted an illegal search under the 4th Amendment.

**RULING:** Relying on a long and extensive body of federal case law relating to searches incident to lawful arrest, the 1<sup>st</sup> DCA upheld the search of the phone, and the admission of the pictures at trial. *However, noting that the issue constituted an issue of great public importance, it certified the question to the Florida Supreme Court for potential further review.*

**DISCUSSION:** While recognizing the unique qualities of a modern cell phone, which can store and contain large amounts of personal data, the court ruled that it was constrained by the dictates of the Florida constitutional provision which requires Florida courts to interpret search and seizure law in accordance with U. S. Supreme Court precedent. Here, the court found that the case was controlled by the holding in U. S. v. Robinson, 414 U.S. 218 (1973), which held that "containers" found upon a person incident to arrest may be searched without "additional justification" (emphasis added.) The court further relied upon the decision of the U.S. Fifth Circuit Court of Appeal in U.S. v. Finley, 477 F.3d 250 (5th Cir. 2007), which held that it was lawful for officers to seize a subject's cell phone and read his text messages after his arrest in a drug buy, finding that the phone was basically a "container" found upon the defendant's person. The court also cited numerous other cases from Georgia, California, and federal courts in support of the search of the phone seized from the body of defendant incident to lawful arrest.

**COMMENTS:** The appellate court in this case was careful to distinguish that the phone was seized from the person of the defendant. The court made the point that since there was no reason to believe that the phone contained evidence of the robbery, the search of the phone may well have been unlawful if it had been seized from the subject's vehicle, as this could have violated the U. S. Supreme Court's recent guidance on vehicle searches contained in Arizona v. Gant, 129 S.Ct 1710 (2009.) Also, as stated above, the court certified this issue to the Florida Supreme Court for potential review, so we may see additional guidance on the cell phone issue in the future.

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Officers should consult with their agency legal advisors to confirm the interpretation provided in this Update and to determine to what extent the case discussed will affect their activities.