IN THE SUPREME COURT OF FLORIDA

CEDRIC TYRONE SMALLWOOD,

Petitioner,

CASE NO. SC11-1130

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

ARGUMENT

I. SEARCHING IMAGES ON A CELL PHONE WHEN THERE IS NO REASONABLE BELIEF THAT THE CELL PHONE CONTAINS EVIDENCE OF A CRIME EXCEEDS THE PERMISSIBLE SCOPE OF A SEARCH INCIDENT TO ARREST.

The holding in *United States v. Robinson*, 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973), that a full search of the person incident to arrest is constitutionally permissible, does not compel a conclusion that searching a cell phone or similar electronic device is the equivalent of searching the "person."

A. *Robinson* should not control this issue because a cell phone is not a simple container, but is more like a computer.

The Supreme Court stated in *Robinson* that a "full search of the person" at the time of arrest is a reasonable search. 414 U.S. at 235; 94 S. Ct. at 477. The Respondent's argument here, as well as the analysis of a growing number of courts, reaches the conclusion that a search of the person includes any cell phones in the person's possession by analogizing a cell phone to a container.[1] This analogy

[1] The most recent decision to accept the "container" analogy of which the Petitioner is aware is *Gracie v. State*, — So. 3d —, 2011 WL 6278304 (Ala. Crim. App. Dec. 16, 2011).

is flawed, however, and its flaws are going to become increasingly apparent as technology continues to develop.

Treating a cell phone as a physical container does not give proper weight to the breadth and depth of the intrusion into private matters that a "fishing expedition" can cause. A cell phone is not an envelope, a folder, or even a file cabinet. It is a portal. A cell phone opens the door to a vast amount of personal information. In that respect it is much more like a personal computer than like any physical container.[2]

Moreover, the sheer quantity of information that can be stored in an electronic device should not be dismissed too quickly. As one article has noted, "[a] typical home computer with a modest 100-megabyte storage capacity can

[2] The Petitioner respectfully urges this Court to consider the storage capabilities of cell phones as one factor, but not the only factor, in removing them from Robinson's scope. To gain an appreciation for the exponential increase in storage and other capabilities of cell phones, one might compare data on early personal computers with product descriptions of current cell phones. One of the many pages devoted to a history of Apple Computers, for example, is Kimmy Powell, An Insanely Great Thirty Years of Innovation: A Brief History of Apple Computers, available at http://www.geeks.com/techtips/2006/techtips-10aug06.htm. Any commercial cell phone providers also have pages summarizing the storage capabilities of their phones. *See, e.g.*, http://www.verizonwireless.com/b2c/index.html. Even a cursory review reveals that basic phones today have

contain the equivalent of more than 100,000 typewritten pages of information." Raphael Winick, Searches and Seizures of Computers and Computer Data, 8 Harvard J. Law & Tech. 75, 81 (1994). It is unrealistic to suggest that any person would be arrested with 100,000 typewritten pages of information on his or her person, whether in a pocket, a planner, a briefcase, or a backpack. The "container" analogy is an oversimplification, not just in quality, but in quantity.

The Petitioner is not aware of any binding precedent supporting a conclusion that a laptop computer can be searched indiscriminately during a search incident to arrest. Outside of the context of border searches, the Petitioner has been unable to locate any reported cases in which a laptop computer was opened and files on the computer searched merely because the computer was in the possession of a person who was arrested.[3] Such an intrusion would generally be viewed as unreasonable.

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exponentially more storage and application capabilities than the personal computers that sat on many desks only 15 or 20 years ago.

[3] On the contrary, it appears that at least a handful of lower courts have distinguished between seizing a computer during a search incident to arrest, which would not require a warrant, and actually searching its contents. *See, e.g.*, *State v. Trahan*, 2010 WL 2854135 (La. App. 1. Cir. June 4, 2010) (noting that a computer was seized during a search incident to arrest, but not searched until police had obtained a warrant); *State v. Washington*, 110 Wash. App. 1012 , 2002 WL 104492 at *3 (Wash. App. Div. 1. 2001) (allowing the seizure of a computer during a

Yet that conclusion would be consistent with treating a cell phone as a mere container.

Requiring a search warrant before rummaging through the contents of a cell phone is both practical and fair. The Petitioner notes that the immediate response of the State Attorney in this case, when informed that the arresting officer had viewed photographs on the phone, was to obtain a warrant before looking at them himself. (R. II, 195-196.) Requiring a warrant will not hinder the gathering of evidence where police can articulate some coherent reason for looking into a cell phone's contents. However, the requirement will honor the Fourth Amendment purpose of placing a neutral magistrate between the citizen who may have a variery of private information stored on his phone, on one hand, and the police officer or other state actor who wants to discover evidence.

B. *Arizona v. Gant* demonstrates why a warrant is required before searching a phone when there is no reasonable belief that the phone contains evidence of a crime.

The holding in *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), is not as critical to this issue as the Supreme Court's reasoning, but

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search incident to arrest, but stating that "[t]he subsequent search of the computer's

to say that *Gant* has no application is an overstatement. *Gant* is a significant step in Fourth Amendment jurisprudence because it reflects a reaffirmation of the traditional rationales for upholding a search incident to arrest, and a repudiation of a "bright line" rule that, in practice, was anything but bright.

The traditional rationales for a search incident to arrest, officer safety and the discovery of evidence, were also present in *Robinson*. 414 U.S. 235, 94 S. Ct. 477.The Court's holding that a "full search of the person" was permitted at the time of arrest was based on these rationales; in the context of a custodial arrest, the intrusion that had already taken place was sufficient to render the subsequent search of the person reasonable. *See id.* However, as discussed above, the search of a cell phone is not a simple search of the person. To resolve the question of when it is reasonable to go beyond the person and search an electronic device capable of vast storage, it is necessary to return to the underlying rationales for a search incident to arrest. Under *Gant*, the rationales of officer safety and preservation of evidence are more important than crafting a "bright line" rule that searches are always valid if they involve a vehicle at the time of arrest. Similarly,

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files...did not fall under any of the exceptions to the warrant requirement."

these two justifications for a search incident to arrest are more important than taking a "bright line" approach that a cell phone is always searchable.

In this case, there was no danger of the destruction of evidence once the cell phone was confiscated; there was no particularized suspicion that the cell phone had been used in, or contained evidence of, a crime; and Mr. Smallwood was in custody (and handcuffed) when it was searched. The goals of the search incident to arrest had already been accomplished, and the proper course of action would have been to go before a neutral magistrate to explain why the police believed evidence of a particular crime would be found on the phone.

C. The "good faith" exception to the exclusionary rule is not available because the search of Mr. Smallwood's phone was not conducted in an objectively reasonable way.

The "good faith" exception to the exclusionary rule is not available to preserve the photos seized from Mr. Smallwood's cell phone because the officer who searched the phone was not acting in any reliance on settled law. The officer was simply looking at the phone's contents based on his experience that it was "not unusual" for people to have photos with evidentiary value on their cell phones. (R. II, 227-228; R. IV, 288-289.)

The "good faith" exception to the exclusionary rule prevents the suppression of evidence that was obtained by police acting in an objectively reasonable way. *See United States v. Leon*, 468 U.S. 897, 920-21, 104 S. Ct. 3405, 3419, 82 L. Ed. 2d 677 (1984). In *Leon*, the "objectively reasonable" conduct was reliance on a search warrant that later provide to be deficient. 468 U.S. at 922; 104 S. Ct. at 3420. The Supreme Court later expanded the good faith exception to include reliance on invalid statutes and inaccurate records. *See Illinois v. Krull*, 480 U.S. 340, 107 S. Ct. 1160, 94 L. Ed. 2d 364 (1987); *Arizona v. Evans*, 514 U.S. 1, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995). Most recently, the Court held that the exception includes "searches conducted in objectively reasonable reliance on binding appellate precedent." *United States v. Davis*, — U.S. —, 131 S. Ct. 2419, 2423-24, 180 L. Ed. 2d 285 (2011).[4]

Davis involved a search of the interior of a car that took place before *Arizona v. Gant* was decided. The Court held that the fruits of the search would not be suppressed because, at the time the search was conducted, it was within the scope of a proper search incident to arrest under *New York v. Belton*, 453 U.S. 454,

[4] The State argued for the first time on appeal that the good faith exception applied in this case; Davis had not yet been decided by the United State Supreme Court.

101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981). The Court noted that *Belton* had attempted to create a "bright line" rule, and that rule was widely followed. *See Davis*, 131 S. Ct. at 2424. The Court reasoned that the deterrent function of the exclusionary rule would not be served by invalidating a search that had complied with valid judicial precedent at the time it was conducted. *Id.* at 2428-2429.

No such precedent exists in this case. As noted in the First District opinion, the issue of whether a search incident to arrest includes the contents of cell phones has been resolved in different ways by a number of state and federal courts. *See Smallwood v. State*, 61 So. 3d 448, 453-459 (Fla.1st DCA 2011). Even the Respondent's Answer Brief concedes that "there is no well delineated case law to provide guidance to an officer in performance of his duties with respect to review of cellular phone data...." *See* Respondent's Answer Brief at 36-37. The testimony of the arresting officer, both at his deposition and at trial, does not include any indication whatsoever that he was relying on judicial precedent (or any other form of authority) when he looked for photos on Mr. Smallwood's phone. The officer simply stated that he knew people sometimes take pictures that have evidentiary

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The First District Court of Appeal did not reach this issue.

value. That general belief is not enough to justify overlooking the intrusive nature of the search.

D. The error in admitting photos from Mr. Smallwood's phone was not harmless.

The State has not met its burden of demonstrating that the error in admitting the photographs taken from Mr. Smallwood's phone was harmless. The State's harmless error analysis is an extensive summary of the evidence presented at trial. *See* Respondent's Answer Brief at 38-45. As this Court has repeatedly reaffirmed, however, the proper inquiry is not whether there was "overwhelming" evidence against a defendant: "The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test." *State v. DiGuilio*, 491 So. 2d 1129, 1139 (Fla. 1986); *accord Johnson v. State*, 53 So. 3d 1003, 1007 (Fla. 2010); *Cooper v. State*, 43 So. 3d 42, 47 (Fla. 2010) (reversing conviction that had been affirmed based on an improper analysis of harmless error); *Ventura v. State*, 29 So. 3d 1086, 1090 (Fla. 2010) (reversing conviction based on improper use of "overwhelming evidence" test).

The proper inquiry is whether there is a reasonable possibility that the error contributed to the verdict. *DiGuilio*, 491 So. 2d at 1135 ("The harmless error test...places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.") This requires the court closely to examine the impermissible evidence, not just the evidence on which the jury appropriately could have relied. *Id. DiGuilio* and its progeny directly reject the proposition that the quantity of evidence supporting the conviction can render an error harmless. *Id.* at 1139.

Examining the photographs taken from Mr. Smallwood's phone reveals their highly prejudicial nature, and this is supported by the trial judge's comment that he was surprised the jury deliberated so long after seeing them:

> COURT: You know, this was a pretty bold act from what I can see and not at all that well thought out, I mean there was from the aspect of from the robber's point of view, but as far as the aspect from it as the photos on a phone is amazing.
>
> The one surprising thing to me, quite frankly, in the case is what took the jury so long to come back with a conviction when it was pretty clear to me from the photos...

(R.II, 252-253.)

It is reasonable to conclude that the photos also made an impression on the jury. It is also noteworthy that no weapon was ever found at the scene or when Mr. Smallwood was arrested, and that the only link between Mr. Smallwood and a weapon matching the description of witnesses to the robbery was found on the cell phone. Similarly, the cash taken during the robbery was linked to Mr. Smallwood through an inference that it was depicted in photos stored on his phone. Without that evidence, along with photographs of Mr. Smallwood and his fiancee holding unspecified amounts of cash, the jury would have had to reach a verdict based primarily on voice identification, which would have been a very different scenario. Admitting the photos into evidence was harmful error.

CONCLUSION

The proper response to the certified question before this Court should be guided by balancing the need for information on a cell phone with the depth and breadth of the potential intrusion a warrantless search will cause. As the First District correctly noted, "cell phones can make the entirety of one's personal life available for perusing by an officer every time someone is arrested for any offense." This level of intrusion is not justified even by the fact of arrest, and certainly not by a general hope that evidence will be found on the phone.

For all the foregoing reasons, and as more fully set forth in his Initial Brief, Mr. Smallwood requests that this Court answer the certified question in the negative, and that his case be remanded for further proceedings.

CERTIFICATES OF SERVICE AND FONT SIZE

I hereby certify that a copy of the foregoing has been furnished by electronic transmission to Christine Guard, Assistant Attorney General, Office of the Attorney General, The Capitol, PL-01, Tallahassee, FL 32399-1050, this 19th day of December, 2011. I hereby certify that this brief has been prepared using Times New Roman 14-point font.

Respectfully submitted,

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