Supreme Court Report

Low-tech high court to weigh police search of smartphones

Posted Apr 1, 2014 3:50 AM CDT
By Mark Walsh

Jeffrey Fisher, who represents Riley in the Supreme Court: "The police shouldn't have any access to a cellphone's digital content." Photo courtesy of Fisher.

U.S. Supreme Court Justice Elena Kagan told a university audience last summer that she and her colleagues "are not necessarily the most technologically sophisticated people."

While law clerks regularly use e-mail, Justice Kagan said last August, the justices haven't taken to communications technology that most working Americans have used for at least two decades. Much of the court's internal work is conducted as it has been for decades, via memos printed on ivory paper and delivered by messenger to the justices' chambers, Kagan said.

But the Supreme Court's caseload often intrudes on this old-fashioned image. This month, the court will hear arguments in two cases involving whether the police may search the contents of a cellphone seized incident to the lawful arrest of a criminal suspect.

The cases come just four years after the court dealt with the Fourth Amendment implications of a warrantless search of government employee's pager. In a few short years, the justices are moving from a relatively old technology to the latest smartphones, with a case involving an old "flip phone" thrown in for good measure.

"If we took a survey of Americans, and they thought that everything in their smartphones would be accessible to a police officer if they were arrested, they would be very disturbed," says Charles E. MacLean, an assistant law professor at Indiana Tech Law School.

For the cases of *Riley v. California* and *United States v. Wurie*, to be argued April 29, the justices will be presented with two sets of facts, and a gulf of about a decade in cellphone technology.

In 2007, Boston police officers arrested Brima Wurie for possession of crack cocaine after they observed him make a sale to another person in his Nissan. At the station, while Wurie was being booked, officers noticed that one of two cellphones taken from him—a Verizon LG flip phone model—was repeatedly receiving calls from a source the phone identified as "my house."

Without obtaining a warrant, officers opened the phone and browsed its call log to find the phone number associated with "my house." They were able to get an address through an online directory. The phone's screen featured a photo of young woman and a baby.

Wurie denied living at the address, but police suspected they might find a larger "mother cache" of crack cocaine there. Upon arriving at the address, police observed through a window the woman pictured on the suspect's phone, as well as a mailbox with Wurie's name on it.

After obtaining a warrant, the police found 215 grams of crack cocaine and other contraband. Once a federal district court rejected a motion to suppress the cellphone search, Wurie was convicted of drug and weapons charges and sentenced to 262 months in prison.

SEARCH PRECEDENTS

A panel of the 1st U.S. Circuit Court of Appeals at Boston ruled 2-1 that evidence stemming from the search of Wurie's phone should have been suppressed.

The majority traced the evolution of modern search-incident-to-arrest doctrine, including key Supreme Court decisions such as *Chimel v. California* (1969), which said such warrantless searches were justified for the safety of police officers and to seize evidence that might be destroyed; and *U.S. v. Robinson* (1973), in which the court upheld a search of an arrestee that turned up a crumpled cigarette package found to contain drugs.

In setting a bright-line rule in that case, the court said that officers conducting a search incident to arrest may open and search through all items on the suspect, even when they are in a closed container, which has been interpreted to include purses and wallets.

Although the case before it involved a relatively rudimentary flip phone, the 1st Circuit majority observed that "in reality, a modern cellphone is a computer, and a computer is not just another purse or address book."

"That information is, by and large, of a highly personal nature," including photos, written and audio messages (text, email and voicemail), calendar appointments, Web search and browsing history, and financial and medical records, the 1st Circuit continued.

The court ruled that warrantless cellphone searches were categorically unlawful under the search-incident-to-arrest exception to the Fourth Amendment.

Meanwhile, in California a college student named David Leon Riley was having his troubles with the police in 2009. His Lexus was pulled over by San Diego police for having expired tags. Police found that Riley was driving on an expired license, and they impounded his car.

An inventory search turned up two guns hidden under the hood, leading to Riley's arrest. The police seized Riley's phone, a Samsung smartphone, then conducted two separate, warrantless searches of it. At the scene, an officer scrolled through the phone's contents and noticed that some words in text messages and contacts that normally began with the letter K instead led off with the letters CK. The police believed this was related to a gang known as the Crip Killers or the Bloods.

The second search occurred hours later at a police station. A gang unit detective searched the phone looking for evidence of other crimes, he would later testify. The detective found photos and videos suggesting Riley's gang membership and a photo of Riley posing in front of an Oldsmobile that the police suspected had been involved in a shooting some three weeks earlier.

Riley was eventually charged with attempted murder and other counts related to the earlier shooting. Prosecutors also

charged that the crimes were committed to benefit a criminal gang.

Riley was convicted based largely on circumstantial evidence such as the photos from his phone linking him to the Oldsmobile. With gang-related sentencing enhancements, he received 15 years to life in prison.

While Riley's case was pending, the California Supreme Court had ruled in *People v. Diaz* that the Fourth Amendment's search-incident-to-arrest doctrine permitted police to search cellphones, even hours later at a station, whenever the phone had been taken from the person of the arrestee. A state appellate court had no trouble ruling that the *Diaz* decision controlled Riley's case and the police searches of his cellphone were legal.

Adam M. Gershowitz, a professor at William & Mary Law School who has written about cellphone searches, says he is encouraged that the court took the two cases, including the one involving a type of smartphone that many people use.

"Plenty of drug dealers still use flip phones," he says, so those are still important issues, but "we're really living in an iPhone and Android world."

"I think it will be very hard ... to fashion a rule on what content can be searched and what content cannot be searched" in the context of warrantless searches incident to arrest, Gershowitz says.

Jeffrey L. Fisher, a professor at Stanford Law School who represents Riley in the Supreme Court, says he will encourag the justices to rule that once the police have seized a suspect's cellphone and have exclusive possession of it, "they shouldn't have any access to the digital content."

"The police should not be allowed to conduct these wide-ranging searches of the digital content of the phone any more than if they went to your home they could go rummaging through your files" without a warrant, Fisher says.

California prosecutors didn't respond to a request for comment, but they argue in court papers that the U.S. Supreme Court's precedents in this area validate the search of Riley's phone because "it was an item of personal property on his person at the time of his lawful arrest."

GREATER LATITUDE URGED

In an early brief in *Wurie*, U.S. Solicitor General Donald B. Verrilli Jr. argues that *Robinson* and other precedents establish that the police may search any item found on the person of an arrestee.

Also, cellphone searches are critical to preserving evidence because "a significant risk exists that evidence contained or a cellphone could be destroyed by an arrestee's confederates before the police have the opportunity to obtain a warrant," Verrilli says in the brief.

Verrilli also argues that the 1st Circuit's blanket rule against warrantless cellphone searches in this context goes too far, and such searches should at the very least be permitted when the police are looking for evidence related to the crime of arrest.

Clifford S. Fishman, a former New York City prosecutor and now a law professor at the Catholic University of America, makes a similar argument.

"Because a cellphone contains so much information, it should be treated differently from a pair of pants or an address book or a wallet," says Fishman, who wrote about the issue recently in the *Rutgers Law Review*.

But if the police thought a drug suspect had used his cellphone to facilitate narcotics sales, for example, they should be able to search the phone for such evidence incident to arrest for that particular crime, Fishman argues.

"Give the police some room to fish, in limited circumstances," he says, "but don't give them the entire ocean."

This article originally appeared in the April 2014 issue of the ABA Journal with this headline: "Learning How to Cell: Low-tech high court to weigh police search of smartphones."