

The Low Speed Chase that Gives Us Admissible Cell Phone Photo after a Warrantless Search

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A police officer stopped a car driving with a flat tire, cracked windshield and its bright lights on. *People v. Gorostiza*, 2009 Cal. App. Unpub. Lexis 9494 at *1.

The passengers might have been hoping, “There is nothing to see here.”

After stopping the car with the Defendant and two passengers, the Defendant drove away from the stopping officer while the police officer opened the car door. As one can suspect, the police officer engaged in a low speed chase.

The Defendant again tried to start another low speed chase after being stopped a second time, but the car would not re-start. One passenger escaped on foot after the car was stopped. *Gorostiza*, at *2. The owner of the car, one of the passengers but not the driver, gave consent to search the car.



Search Incident of Arrest of Cell Phone Photos

The police found a loaded pistol-grip 12-shot gun during the search of the car. Two cell phones were also found, one with a dead battery and the other in the driver’s area. *Gorostiza*, at *3.

The police officer opened the working cell phone and saw a photo that resembled the Defendant holding the shotgun found in the car. *Gorostiza*, at *3.



The police officer accessed the cell phone menu and opened the “My Albums” folder. *Id.* The police officer found two additional photos of the Defendant holding the gun. *Id.*

The Defendant claimed the photos were not of him and he was being framed when questioned on the cell phone photos. *Gorostiza*, at *3-4.

Investigation and Search of the Cell Phone

Another investigating police officer sent the cell phone photos via MSS message to another investigating officer’s email. The cell phone photos were printed and used at the criminal trial of the Defendant. *Gorostiza*, at *5.

Where the Cell Phone Photos Properly Admitted?

The Defendant tried to suppress the cell phone photos, claiming an improper search incident of arrest because the cell phone was “not a container” or part of a person. *Gorostiza*, at *5. The Defense further argued the cell phone deserved “heightened protection.” *Gorostiza*, at *5.

The Court, as a preliminary matter, found the Defendant had a reasonable expectation of privacy in one of the cell phones because the police officer had knowledge the phone belonged to the Defendant. *Gorostiza*, at *6-7.

The Court found the search of the car that found the shotgun was proper, because the police officer had permission to search the car by the owner. *Gorostiza*, at *7.

The cell phone was found in a leather case, which at the time had unknown contents. The image of the Defendant holding the gun was visible once removed from the leather case. *Gorostiza*, at *7.

The Court held that the photo that was seen on the cell phone screen was a proper search, because it was found in a “closed container” during a valid search after the owner gave permission to search. *Gorostiza*, at *8.

Dodging the Bigger Issue

The bigger issue was whether the police officer conducted a proper search of the cell phone by exploring the menu items and additional photos in a sub-folder. Did the consensual search of the car allow the police officer to search for additional photos on the phone?

The Court dodged these issues, noting that two additional photos were very similar to the first photo found pursuant to a valid search. The Court stated:

Because the admission of the additional photographs seized during the further search of the cell phone was not prejudicial, we need not determine additional questions raised by the defendant in his argument. For example, we need not determine if the consent extended to a search of the electronic contents of the telephone, we need not determine if cell phones are subject to heightened privacy interests, and we need not determine if Preis’s [the police officer] knowledge that the telephone belonged to defendant should have curtailed his search of the interior of the cell phone. *Gorostiza*, at *13.

Bow Tie Thoughts

The issue of whether a cell phone has heightened protection during a search will one day be decided. More importantly, whether searching the menu features of a cell phone would be a valid search in similar facts. This case may have addressed these issues if the photos had been different, such as firing the gun in a different location, or perhaps committing an act of vandalism or other crime.

I am very glad this is an unpublished opinion because of the preservation methods used by the police. The collection was potentially problematic because the State used no forensic or defensible tools to collect the cell phone photos. While the State’s actions were likely acceptable in sending the photos to a police officer, it carried risk.

The collection methodology of sending a MSS message of the photo from the defendant’s phone to an investigating officer can open an ugly can of worms of destroying data, which could cause a

mistrial or severely undermine a prosecutor's case. It could provide an entertaining cross-examination by a defense attorney on what procedures were undertaken to ensure the defensibility of the evidence, especially if the defense offered a collection expert to discuss proper procedures to preserve cell phone evidence.

Products from [Paraben Corporation](#) are specifically designed for forensically imaging cell phone contents [Bow Tie Note: D4 is business partners with Paraben Corporation]. These products are currently being used by electronic discovery specialists, law enforcement, and even the US military in Iraq imaging the cell phones of insurgents who use cell phones to trigger road side bombs. Other products are also on the market. When proper tools are commercially available, why risk destroying key evidence by sending text messages from the defendant's phone during an investigation?