California Court OKs Warrantless Search of Cell Phone

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The text messages in a defendant's cell phone are in no way different, for the purposes of a police search after an arrest, from the defendant's clothing or a cigarette package.

That was the holding of the California Supreme Court on January 3, 2011, in *People v. Diaz,* a case in which the state's highest court approved the police's warrantless search of the text message folder in defendant Gregory Diaz's phone. The state court followed U.S. Supreme Court precedent, which permits searches "incident to a lawful arrest" but hasn't yet dealt with cell phones, and rejected Diaz's interesting argument that the nature of the phone – the fact that it can contain so much personal information – should lead to a different result.

Diaz had argued that although the phone itself could be seized by the police without a warrant, if the police wanted to read its contents in the form of the messages inside it, they needed to go to a judge and get a warrant based on probable cause.

The case represents a notable collision in an influential state court between the traditional rules of Fourth Amendment jurisprudence and the changing nature of modern technology. U.S. Supreme Court precedent deals with articles of clothing, cigarette packages, and foot lockers taken from defendants who are

arrested. Today's smartphones, as the dissenting judge in *Diaz* pointed out, can hold "hundreds or thousands of messages, photographs, videos, maps, contacts, financial records, memoranda and other documents, as well as records of the user's telephone calls and Web browsing." Should they be treated just like a pack of cigarettes or a scrap of paper in a coat pocket?

In a 5-2 ruling, the court majority said yes. The U.S. Supreme Court has made it clear, the majority said, that the nature of the object seized from the defendant is irrelevant, as long as the seizure is done pursuant to a lawful arrest and the object is "immediately associated" with the defendant's person. If the rules need to be changed because of the nature of today's smartphones, the U.S. Supreme Court has to do so, the majority ruled.

The two dissenting judges saw the matter quite differently.

"Because the data stored on a mobile phone or other electronic device is easily distinguished from the arrestee's actual person and in light of the extraordinary potential for invasion of informational privacy involved in searching data stored on such devices, I would hold mobile phones, smartphones and handheld computers are not ordinarily subject to delayed, warrantless search incident to arrest," dissenting judge Kathryn Werdegar wrote. The dissenters would have permitted "some examination of the device, not amounting to a search of its data folders," but to them, the informational privacy issue was paramount.

In 2009, the Ohio Supreme Court sided with the defendant in a similar case, in a 4-3 ruling that highlighted the "expectation of privacy in a cell phone's contents."

Neither the majority opinion nor the dissent in *Diaz* cited the recent decision by the U.S. Court of Appeals for the 6th Circuit in *United States v. Warshak,* which held that a subpoena to obtain e-mails from an Internet service provider requires a warrant. Perhaps the distinction is that *Diaz* arose in the context of a search following a lawful arrest, a situation that has long been viewed as an exception to the warrant requirement, while *Warshak* did not. We will continue to follow this type of case very carefully.

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