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Constitutional Law – Warrantless Searches – Whether The Search Incident to Arrest Exception Should Apply to Data Stored on Cellular Phones

Cover Page Footnote

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**CONSTITUTIONAL LAW – WARRANTLESS SEARCHES –
WHETHER THE SEARCH INCIDENT TO ARREST
EXCEPTION SHOULD APPLY TO DATA STORED ON
CELLULAR PHONES**

Jeremy Ray*

United States v. Wurie, 728 F.3d 1 (1st Cir. 2013)¹

I. FACTS

In 2008, Defendant Brima Wurie was charged with distributing crack cocaine within 1,000 feet of a school, possession with intent to distribute, and felony possession of a firearm and ammunition.² During booking, police inventoried Wurie’s personal property, including two cellular phones.³ Officers of the Drug Control Unit examined one of the seized cell phones shortly after Wurie was brought to the police station.⁴ The officers used information contained on Wurie’s cell phone to determine his place of residence, eventually using this information to obtain and execute a search warrant.⁵ The police seized crack cocaine and illegal weapons during this search.⁶ Wurie contends that the police obtained this evidence illegally, and therefore the court should suppress it.⁷

The lower court denied the Defendant’s motion to suppress, failing to distinguish the “warrantless search of a cell phone from the search of other types of personal containers found on a defendant’s person that fall within . . . the Fourth Amendment’s reasonableness requirements.”⁸ The Defendant was found guilty of felony possession of a firearm and ammunition, possession of crack cocaine with intent to distribute, and distribution of crack cocaine.⁹ Wurrie appealed the suppression issue to the First Circuit Court of Appeals.¹⁰ The proper standard of review for a denial of a motion to suppress is clear error

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¹ *United States v. Wurie (Wurie I)*, 728 F.3d 1 (1st Cir. 2013).

² *United States v. Wurie (Wurie II)*, 612 F. Supp. 2d 104, 105 (D. Mass. 2009).

³ *Id.* at 105.

⁴ *Id.* at 106.

⁵ *Id.* at 106-07.

⁶ *Id.*

⁷ *Id.* at 105.

⁸ *Id.* at 110.

⁹ *United States v. Wurie (Wurie I)*, 728 F.3d 1, 2 (1st Cir. 2013).

¹⁰ *Id.* at 1.

for the factual findings and *de novo* for the conclusions of law.¹¹ The appellate court reversed the denial of Defendant's motion to suppress, vacated his conviction, and remanded his case to the district court.¹²

II. ISSUES

The Bill of Rights enumerates certain freedoms that are fundamental to justice, which set limits on government actions regarding personal liberties.¹³ The Fourth Amendment provides protection from unwarranted searches and seizures, specifically providing:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no [w]arrants shall issue, but upon probable cause, supported by [o]ath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹⁴

Here, the Police obtained the seized evidence unlawfully and unreasonably, contrary to the Constitution of the United States, and violated Wurie's expectation of privacy.

The Supreme Court has held that warrantless searches are presumptively unreasonable absent "one of the narrow and well-delineated exceptions to the warrant requirement"¹⁵ For example, a search incident to arrest is an exception to the Fourth Amendment's requirement that officers obtain a warrant before performing a search.¹⁶ Although it is not unreasonable for police to search any container or article in a defendant's possession during standard booking procedures,¹⁷ arguably that search should not extend to a defendant's cell phone.

¹¹ *United States v. Richardson*, 385 F.3d 625, 629 (6th Cir. 2004).

¹² *Wurie I*, 728 F.3d at 14.

¹³ *See, e.g.*, U.S. CONST. amend. IV; U.S. CONST. amend. XIV, § 1.

¹⁴ U.S. CONST. amend. IV.

¹⁵ *Flippo v. West Virginia*, 528 U.S. 11, 13 (1999) (citing *Katz v. United States*, 389 U.S. 347, 357 (1967)).

¹⁶ *United States v. Robinson*, 414 U.S. 218, 234 (1973) (recognizing the need to protect officers and preserve evidence for later use at trial).

¹⁷ *Illinois v. Lafayette*, 462 U.S. 640, 648 (1983).

The single-purpose container exception is another narrow exception to the warrant requirement.¹⁸ This exception states that an individual cannot have a reasonable expectation of privacy for a container in which the contents are evident by its external appearance.¹⁹ Because its content is not clear by its external appearance, a cell phone fails to satisfy this definition. Thus, the owner may have a reasonable expectation of privacy regarding the phone's content. Therefore, the district court should have suppressed the evidence because the search and seizure did not satisfy one of the narrow exceptions to the warrant requirement.

III. ANALYSIS & RAMIFICATIONS

A normal incident of custodial arrest justified the possession of Wurie's cell phone.²⁰ However, the warrantless search of the content of Wurie's cell phone violated his Fourth Amendment rights, and the court should not have admitted the seized evidence. Thus, the First Circuit Court of Appeals appropriately held that the district court erred in ruling that an inspection of a cell phone's content satisfied the requirements of a search incident to arrest because Wurie had a reasonable expectation of privacy for his phone's content.²¹

Regarding this issue, some argue that "the Supreme Court and legislatures should . . . scale back the ability of law enforcement to search digital devices incident to arrest."²² In fact, some "lower courts have incorrectly applied the search incident to arrest exception and prior Supreme Court precedent . . ." to authorize cell phone searches.²³ Indeed, the Court of Appeals for the Fifth Circuit refused to recognize a distinction between searching physical containers and searching electronic equipment for digital information.²⁴

From a defendant's point of view, one obvious way to prevent access to potentially incriminating information contained on a cell

¹⁸ See *California v. Acevedo*, 500 U.S. 565, 580 (1991) (holding the single-purpose container exception allows officers to bypass the warrant requirement when the distinctive nature of the container makes the container's contents a foregone conclusion); *Arkansas v. Sanders*, 442 U.S. 753, 764 n.13 (1979).

¹⁹ *Sanders*, 442 U.S. at 764 n.13.

²⁰ See *United States v. Edwards*, 415 U.S. 800, 805 (1974).

²¹ *United States v. Wurie (Wurie I)*, 728 F.3d 1, 14 (1st Cir. 2013).

²² Adam M. Gershowitz, *Password Protected? Can a Password Save Your Cell Phone from a Search Incident to Arrest?*, 96 IOWA L. REV. 1125, 1175 (2011).

²³ Chelsea Oxtan, *The Search Incident to Arrest Exception Plays Catch Up: Why Police May No Longer Search Cell Phones Incident to Arrest Without a Warrant*, 43 CREIGHTON L. REV. 1157, 1158 (2010).

²⁴ *United States v. Finley*, 477 F.3d 250, 260 (5th Cir. 2007).

phone is password protection; however, password protection alone may not entirely prevent police access.²⁵ Because law enforcement officials are increasingly tech-savvy, officers may have the time and ability to bypass password protection.²⁶

Additionally, courts may face a number of other issues related to cell phone usage, admissible searches, and law enforcement intrusion in the future. For example, the court may need to address whether one who uses a built-in remote access application to wipe a phone's content clean is tampering with evidence. Further, applications now exist that erase a phone's content when a person enters a specific password, or if a person enters a certain number of incorrect passwords. If prompted to give the phone's password, the detainee could give the predetermined password to officers, eliminating the content upon entry of the password. Would this qualify as tampering with evidence?

Appropriately, there is no policy that allows officers to search the cell phones of arrestees for their own amusement. However, this is precisely what happened to Nathan Newhard when he was arrested for driving while intoxicated.²⁷ The police conducted a search incident to arrest and found a cell phone.²⁸ One officer viewed the phone's content, discovering pictures of Newhard and his former girlfriend in "sexually compromising positions."²⁹ Worse still, the officer shared these pictures with others at the police station, causing Newhard both personal and professional harm.³⁰ While this example is extreme, the situation illustrates what can happen when society devalues an individual's reasonable expectation of privacy.

IV. CONCLUSION

The use of cell phones in today's society is pervasive. The time when cell phones were simply a small, portable way of making a call has long passed. For example, cell phones now function as calculators, cameras, flashlights, GPSs, and watches. Additionally, and more significantly, smart phones allow the exchange of documents, pictures, videos, text messages, and emails at the touch of

²⁵ Gershowitz, *supra* note 22, at 1175 (recognizing that "computer-savvy officers" at the police station may have the time and technology to unlock a phone's contents).

²⁶ *Id.*

²⁷ *Newhard v. Borders*, 649 F. Supp. 2d 440, 444 (W.D. Va. 2009).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

a button.³¹ In fact, nearly fifty-six percent of American adults now own a smart phone of some kind.³² Based on these facts, it seems obvious that a person would have a reasonable expectation of privacy in his or her phone's content. A court should not determine that the search of this content is permissible incident to a valid arrest merely because an individual is in custody. Instead, courts should require a warrant from a neutral magistrate before officers may rummage through an individual's cellular device.

Ultimately, the Supreme Court must decide the validity of warrantless searches of cell phones incident to arrest. Consequently, the First Circuit denied rehearing *en banc* to hurry this issue to the Supreme Court.³³ Similarly, though factually distinct, a case has been brought before the Court asking “[w]hether or under what circumstances the Fourth Amendment permits police officers to conduct a warrantless search of the digital contents of an individual's cell phone seized from the person at the time of arrest.”³⁴ The Supreme Court, in making this decision, will have to balance individuals' reasonable privacy interests with the potential usefulness of such information by law enforcement. I believe the Supreme Court will eventually decide that the warrantless search of a cell phone incident to arrest is indeed intrusive, requiring the approval of a neutral magistrate.

The Supreme Court, subsequent to the completion of this article but before publication, issued an opinion concerning this case. Chief Justice Roberts delivered the opinion of the Court stating:

Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans “the privacies of life[.]” The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching

³¹ Adam M. Gershowitz, *The iPhone Meets the Fourth Amendment*, 56 UCLA L. REV. 27, 41-42 (2008).

³² AARON SMITH, SMARTPHONE OWNERSHIP—2013 UPDATE 2 (2013), available at http://www.pewinternet.org/files/old-media/Files/Reports/2013/PIP_Smartphone_adoption_2013_PDF.pdf.

³³ *United States v. Wurie (Wurie III)*, 724 F.3d 255, 255 (1st Cir. 2013).

³⁴ Brief for Petitioner at i, *Riley v. California*, 134 S. Ct. 2473 (2014) (No. 13-132), 2013 U.S. S. Ct. Briefs LEXIS 3082.

a cell phone seized incident to an arrest is accordingly simple — get a warrant.³⁵

This quote from the Chief Justice echoes the premise of the article. We should not forfeit individual liberties when such a simple solution exists — “get a warrant.”³⁶

³⁵ *Riley v. California*, 134 S. Ct. 2473, 2494-95 (2014) (citation omitted).

³⁶ *Id.*