

**IN THE SUPREME COURT
OF OHIO**

STATE OF OHIO,
Plaintiff-Appellee,

Supreme Court Case No. 2008-1781

vs.

On Appeal from the Greene County
Court of Appeals, Second District

ANTWAUN SMITH,
Defendant-Appellant.

Court of Appeals Case No. 07-CA-47

**MEMORANDUM OF APPELLEE - STATE OF OHIO IN OPPOSITION OF
JURISDICTION**

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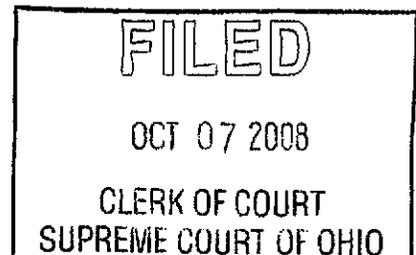


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STATEMENT OF THE CASE

On February 2, 2007, The Defendant was indicted by the Greene County Grand Jury as follows: Count I, Trafficking in Cocaine, in violation of Ohio Revised Code §2925.03(A) and a felony of the first degree; Counts II and III, Possession of Criminal Tools, in violation of Ohio Revised Code §2923.24(A) and felonies of the fifth degree; Count IV, Possession of Cocaine, in violation of Ohio Revised Code §2925.11(A) and a felony of the first degree; and Count V, Tampering With Evidence, in violation of Ohio Revised Code §2921.12(A)(1) and a felony of the third degree.

The Defendant entered a plea of not guilty to all the charges contained in the indictment. The Defendant filed a motion to suppress any statements made, as well as a motion to suppress evidence taken from the Defendant's cell phone upon his arrest. A hearing was held on that motion on March 22, 2007. The trial court sustained the Defendant's motion with respect to any statements he made to police, and overruled the motion with respect to the cell phone search. The trial court did, however, exclude photos taken from the cell phone on the basis that they were not relevant to the case.

After a jury trial held on March 26-28, 2007, the jury returned a verdict of guilty on all counts. The Defendant was sentenced to a total of 12 years, of which 8 of those years are mandatory. The Defendant then filed a timely appeal.

The Second District Court of Appeals affirmed the decision of the trial court to overrule the Defendant's motion to suppress the search of the cell phone, finding that a cell phone is a container and law enforcement may conduct a warrantless search of that container incident to a lawful arrest if that container is on the person.

STATEMENT OF FACTS

On January 21, 2007, Detective Craig Polston of the ACE Task Force received a call informing him that a large amount of crack cocaine was found in the residence of Wendy Northern at 3884 Timberline Drive in Beavercreek, Ohio (TR. p. 99-100). Ms. Northern had been transported to Miami Valley Hospital as a result of a possible drug overdose. Detectives Polston and Scott Molnar (also from the ACE Task Force) responded to the hospital to interview Ms. Northern (TR. p. 100-101). While at the hospital, Ms. Northern was asked about her main drug supplier and if she would cooperate with detectives and place phone calls to her supplier to set up a controlled buy (TR. p. 101). Ms. Northern agreed to cooperate with detectives (TR. p. 101). Ms. Northern told detectives that her drug supplier, to whom she referred as 'Capo', had been riding as a passenger in a vehicle that had been stopped down the street from her home and was cited for possessing a small amount of marijuana (TR p. 111-112). Detective Polston pulled the information from the traffic stop (including vehicle type, color, make and model) and subsequent arrest and learned the identity of the passenger to be Antwuan Smith (TR p. 112). Detective Polston then showed a BMV photo of Antwuan Smith to Wendy Northern and she identified Mr. Smith, the Defendant to be her drug supplier a.k.a. 'Capo' (TR p. 112). After getting Ms. Northern some medication she needed, the detectives took her to the police station to get a written statement and to place some controlled phone calls (TR p. 102-103). These phone calls were placed to a cell phone and were recorded (TR p. 103). Detective Polston asked Ms. Northern to request an ounce of crack cocaine (which equates to approximately 28 grams) from her supplier (TR p. 107).

During the phone conversation, the Defendant agreed to come to Ms. Northern's home to deliver an ounce of crack cocaine (TR p. 291). The Defendant was originally supposed to be at Ms. Northern's home, but did not show up until much later than expected (TR p. 294-295). While Ms. Northern was being transported to back to the Greene County jail, she received a call from the Defendant telling her that he was in her driveway (TR p. 295). This information was immediately relayed to police officers.

While in the driveway of the home, the Defendant and his passengers were ordered out of the vehicle at gunpoint (TR p. 298). Officer Williams ordered the Defendant to walk diagonally back toward his voice (TR p. 300). When ordered to put his hands up, the Defendant did not comply; this command was repeated several times and the Defendant finally complied (TR p. 208-209). Officer Williams testified there was "a good two to four second time span" where the Defendant hands weren't visible (TR p. 212). The Defendant also "took a few shuffle steps back with his hands where [Officer Williams] still could not see [his hands]" (TR p. 214-215). During this time, there were three to six inches of snow on the ground and it was dark outside (TR p. 216, 296). No crack cocaine was found on the Defendant's person. Crack cocaine was ultimately discovered under the snow in a footprint left by the Defendant when he exited the vehicle (TR p. 309). The Defendant was arrested at the scene.

PROPOSITION OF LAW NO. 1:

WHEN A SUSPECT IS SEARCHED INCIDENT TO A LAWFUL ARREST, A CELL PHONE IN THE SUSPECT'S POCKET IS ANALOGOUS TO A CLOSED CONTAINER AND MAY PROPERLY BE SEARCHED WITHOUT A WARRANT

It has been long recognized that a warrantless search of an individual who has been lawfully arrested can be conducted without a resulting violation of the Fourth Amendment. In *Chimel v. California*, the United States Supreme Court recognized that, in an effort to discover and preserve evidence and disarm a suspect before taking them in to custody, a government agent may conduct a search incident to arrest. *Chimel v. California* (1969), 395 U.S. 752. Pursuant to an officer's authority to conduct a search incident to arrest, police are authorized to conduct a full search of the suspect's person and the area within their immediate control. *Id.* It has also been recognized that a search that could be conducted at the time of arrest may also be legally conducted later when the accused arrives at the location where he will be detained. *U.S. v. Edwards* (1974), 415 U.S. 800.

The ability to search the contents of a cell phone incident to arrest is an issue of first impression in Ohio. The Defendant erroneously relies upon *State v. Martinez*, Shelby County App. No. 13-04-49, 2006 Ohio 2002. In that case, the Defendant's vehicle was stopped by an officer at the behest of another officer. The requesting officer did not have reasonable suspicion the stop the vehicle, and the subsequent search of the Defendant's cell phone by the stopping officer was unsupported by probable cause. It should be noted, however, that the Appellate court in the above

cited case did determine the Defendant's cell phone was a container, and the contents of the "container" was the information that it contained.

Federal courts dealing with the issue have held a defendant's cell phone may properly be searched incident to arrest. In *U.S. v. Finley*, 477 F.3d 250 (5th Cir. 2007), the Defendant drove a drug dealer to the location of a controlled buy for methamphetamine. After the sale was completed and the Defendant drove away, his vehicle was stopped. The Defendant and the drug dealer were ultimately arrested at the scene of the traffic stop, and the Defendant's cell phone was searched incident to his arrest. The Defendant's cell phone was searched later at the location of his detention, and revealed text messages discussing narcotics use and trafficking. The Defendant's call records were also searched at this time. The Court held that the search of the Defendant's cell phone was a valid search of a container incident to arrest, and the delay between the arrest and the search did not invalidate the search, pursuant to *Edwards, supra*.

In this case, the arrest of the Defendant was valid. The police officers had reasonable suspicion the Defendant was engaged in narcotics trafficking, and that was the basis for the Defendant's arrest. The officers had the ability to conduct a full search of the Defendant's person incident to that arrest. The Defendant had a cell phone in his pocket, which is analogous to a closed container. The police had the authority to search this closed container, as they were attempting to preserve evidence of the Defendant's crime. The ACE Task Force had recorded phone calls the Defendant made to the confidential informant; the call records in the cell phone

would provide additional proof that the Defendant in fact made the phone calls the Task Force had recorded.

Detective Polston's testimony is not entirely clear at the motion to suppress whether the cell phone was first searched on scene or when the detectives returned to the police station. However, it has long been recognized that a search which could legally take place at the scene could also legally take place at a later time. See *Edwards*, cited above.

Because the Defendant was the subject of a valid arrest, the police were not required to get a warrant to search his person, and any containers found therein, incident to his arrest. Therefore, the search of the cell phone was legally valid.

Further, even if this Court finds that the cell phone is not the equivalent of a closed container, the police were entitled to search based upon exigent circumstances to prevent the destruction of evidence. It is common knowledge that a cell phone's caller i.d. only holds a finite number of calls in its memory. Officers could not control the number of calls the Defendant's phone would receive between arrest and the time it took to obtain a warrant. It is further established that this Defendant conducted his trafficking with the witness over his cell phone. It is likely then that he conducted his business with other people in a similar fashion. Therefore, the police needed to search the phone and demonstrate the control call on the phone before it was deleted by further incoming calls.

The Defendant is asking this Court to accept jurisdiction to hold that a cell phone must be protected like the stereo equipment in *Arizona v. Hicks* (1987), 480 U.S. 321, where the United States Supreme Court held that an item's contraband

nature must be apparent without some further manipulation by the police officers in order to search under the plain view doctrine. The Defendant cites no other authority for his proposition that the decision by the Second District erred in determining the search of the Defendant's cell phone incident to lawful arrest is valid.

The State submits that *Hicks* is inapposite to the instant case for two reasons. First, the search of the Defendant's cell phone was not conducted under the plain view doctrine, but rather under the search incident to arrest exception that authorizes warrantless searches of closed containers found on the suspect's person at the time of arrest. Secondly, the law enforcement officers had probable cause to believe that the Defendant's cell phone contained evidence of the crime of trafficking as he was using his cell phone to communicate with the confidential informant working under the supervision of the ACE Task Force.

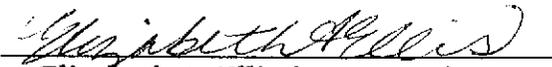
CONCLUSION

The Defendant in this case was the subject of a valid arrest. Therefore, police were not required to get a warrant to search his person, and any containers found therein, incident to his arrest. The Defendant had a cell phone on his person which is analogous to a closed container. Incident to his arrest, police officers were able to search the cell phone without a warrant. Therefore, the trial court did not err in not suppressing the contents of the cell phone.

For the foregoing reasons, the State respectfully requests this Court to decline to accept jurisdiction in this case and dismiss the instant appeal.

Respectfully Submitted,

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By: 
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been sent to Craig M. Jaquith, Assistant State Public Defender, 8 East Long Street, Columbus, Ohio 43215-2998 via regular U.S. mail, the date the same was mailed to the Clerk.

Elizabeth Ellis