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IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

v.

ANTWAUN SMITH,

Defendant-Appellant.

Case No. 2008-1781

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

C.A. Case No. 07-CA-47

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**MERIT BRIEF OF APPELLANT ANTWAUN SMITH**

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OFFICE OF THE OHIO PUBLIC DEFENDER

CRAIG M. JAQUITH 0052997  
Assistant State Public Defender

250 East Broad Street – Suite 1400  
Columbus, Ohio 43215  
(614) 466-5394  
(614) 752-5167 - fax  
craig.jaquith@opd.ohio.gov

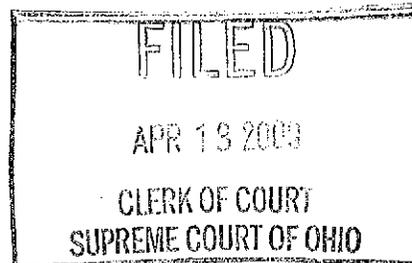
COUNSEL FOR ANTWAUN SMITH

STEPHEN K. HALLER 0009172  
Greene County Prosecutor

ELIZABETH ELLIS 0074332  
Greene County Assistant Prosecutor  
(COUNSEL OF RECORD)

61 Greene Street, Second Floor  
Xenia, Ohio 45385  
(937) 562-5250  
(937) 562-5107 - fax

COUNSEL FOR STATE OF OHIO



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## STATEMENT OF THE CASE AND FACTS

In early 2007, relying on information obtained from crack user Wendy Northern, Beavercreek police detectives came to suspect Antwaun Smith of drug trafficking. (Tr. 135.) Detectives secured Ms. Northern's cooperation, and had her place phone calls to Mr. Smith to set up a controlled buy. (Tr. 51, 107.) In a recorded conversation, Ms. Northern called Mr. Smith to request that he deliver an ounce of crack cocaine to her house. (Tr. 52-53, 58-62.) Her home was placed under police observation. (Tr. 113-14.) Because Mr. Smith arrived later than anticipated, Ms. Northern was already being transported back to the county jail when he appeared at her house. As she did not answer the door, Mr. Smith placed a follow-up call to Ms. Northern to inform her that he was in her driveway. (Tr. 64-65, 167-68.) Officers on the scene were apprised of this call, and arrested Mr. Smith and two passengers from his sport utility vehicle. (Tr. 179, 185.)

No drugs were found in Mr. Smith's possession, but crack cocaine was found on the ground in the snow, near the vehicle. (Tr. 124-25.) Nobody observed Mr. Smith with crack cocaine, and no fingerprints were lifted from the baggie containing the crack. Police officers searched Mr. Smith and recovered \$2,500 in cash and a cell phone. (Tr. 145.) From the vehicle police recovered a digital scale, a marijuana blunt, a holster, and a loaded gun magazine. (Tr. 306.) Later that night, without first obtaining a search warrant, police reviewed the contents of Mr. Smith's cell phone. (Tr. 127-28; Supp. Tr. 33-34.) In addition to "photographs and stuff," the police found call records indicating that the phone had been used to call Ms. Northern, and indicating that her phone had called Mr. Smith's phone. (Tr. 130-32; Supp. Tr. 33.)

Mr. Smith was indicted for trafficking in cocaine, possession of cocaine, tampering with evidence, and two counts of possession of criminal tools. (February 1, 2007, Indictment.) Mr.

Smith pled not guilty and moved to suppress the evidence discovered by the police during the warrantless search of his cell phone. (February 23, 2007, Motion to Suppress.) Subsequent to a suppression hearing, and during trial, the court ruled from the bench that the cell phone was “analogous to a closed container” that, having been lawfully seized, could permissibly be searched by the police. (Tr. 152.) In a written ruling issued after the conclusion of Mr. Smith’s jury trial, the trial court overruled Mr. Smith’s motion on the same basis, after first noting that Mr. Smith had a reasonable expectation of privacy in the contents of his cell phone. (April 11, 2007, Judgment Entry, at p.6.) At trial the prosecution used as evidence the call records and phone numbers retrieved from Mr. Smith’s phone. The photographs obtained from the search of the telephone were not permitted by the court to be used against Mr. Smith, as they were deemed to not be relevant evidence. (Id.) Mr. Smith was convicted of all counts, and sentenced to twelve years in prison. (April 26, 2007, Judgment Entry.)

Mr. Smith filed a timely appeal, raising five assignments of error, one of which was that the warrantless search of his cell phone violated his Fourth Amendment rights. In a two-to-one opinion, the court of appeals affirmed Mr. Smith’s conviction. *State v. Smith*, Greene County App. No. 07-CA-47, 2008-Ohio-3717. The opinion of the court deemed the cell-phone search to be permissible as “a search incident to arrest of [an] item[] found on one’s person.” *State v. Smith*, 2008-Ohio-3717, at ¶ 46. The concurring opinion found the search “reasonable” only because there was “urgency” to obtaining the call records from the phone, because a “reasonable officer could conclude that there might be a limit to the number of previous phone numbers contacted on the cell phone,” and that those numbers might be deleted from the phone’s memory by subsequent numbers. *Id.*, at ¶ 51.

The dissent would have reversed and remanded, finding that the proper view of a modern cell phone should be as a data storage device increasingly indistinguishable from a computer, and that any search thereof—regardless of whether the device is procured by the police during a lawful arrest—must first be authorized by a warrant. *Id.*, at ¶¶ 62-66. Mr. Smith submitted a timely Notice of Appeal and Memorandum in Support of Jurisdiction to this Court, regarding the Fourth Amendment issue. On January 28, 2009, this Court accepted Mr. Smith's appeal.

## ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

### PROPOSITION OF LAW

**When law enforcement personnel lawfully seize a suspect's cellular telephone incident to arrest, the Fourth Amendment prohibits warrantless search of the contents of the telephone.**

As this Court has observed, “the Fourth Amendment protects the individual’s actual and justifiable expectation of privacy from the ear and eye of the government.” *State v. Buzzard*, 112 Ohio St.3d 451, 2007-Ohio-373, ¶ 13.<sup>1</sup> And the United States Supreme Court’s numerous Fourth-Amendment cases have established that “searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.” *Katz v. United States* (1967), U.S. 347, 357. Given the trial court’s determination herein that Antwaun Smith “has a reasonable expectation of privacy in the contents of his cell phone,” the government must demonstrate that a warrantless search of that cell phone falls under an established exception to the warrant requirement. (April 11, 2007, Judgment Entry, at p. 6.) *United States v. Jeffers* (1951), 342 U.S. 48, 51. But no such exception can properly be deemed to justify the warrantless search of Mr. Smith’s cell phone by the Beavercreek police, and this Court must issue a ruling that will bar similar future intrusions upon the privacy rights of Ohio’s citizens.

#### **A. Modern Cellular Telephones Are Analogous to Personal Computers**

It is necessary to look no further than the dissenting opinion below to discern how this case should be decided, and why there is only one appropriate outcome. Quite simply put,

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<sup>1</sup> As noted therein, at fn. 2, because Section 14, Article I, of the Ohio Constitution is worded almost identically to the Fourth Amendment, its protections are deemed coextensive with those afforded by the federal provision.

because a modern cell phone is a sophisticated data storage and display device with considerable capacity for storing numerous types of files, for Fourth-Amendment purposes it must be viewed as a personal computer would be viewed. Therefore, a warrantless search of the contents of a cell phone is unconstitutional. *State v. Smith*, 2008-Ohio-3717, at ¶¶ 54-66. The dissent's assessment of a cell phone's capabilities is concise but thorough, and is indisputably accurate:

The modern cellular phone is unlike most other things that the average citizen normally transports with him or her. It has the capacity to store and display great amounts of information: names, phone numbers, addresses, text messages, e-mails, photographs, videos. Those are some of the more basic features. Modern "smart phones" or "PDAs" can connect to a business server and access corporate data. An internet capable phone might record web browsing history. Music mp3s can be purchased, stored, and played. The divide between the personal computer and the cellular phone appears to be diminishing by the day.

*Id.*, at ¶ 62.

Thus, it readily becomes apparent that if law enforcement personnel seek to search the contents of a cell phone, they "should obtain a search warrant, just as they would when they seize a personal computer from an accused." *Id.*, at ¶ 63. There can be no serious disagreement with the conclusion that a computer cannot be searched by police without first obtaining a warrant. Indeed, a search warrant for a computer must be drafted with a considerable measure of specificity—a warrant authorizing a generalized search of a suspect's computer is likely to be deemed overly broad. See, e.g., *United States v. Riccardi* (10<sup>th</sup> Cir. 2005), 405 F.3d 852, 862 (with respect to lawfully seized computer, not only must a warrant be obtained, but "warrants for computer searches must affirmatively limit the search" to evidence of specific crimes or types of material).

While very few American courts have yet had occasion to rule upon the constitutionality of cell-phone searches, and "weight of authority" cannot be claimed by either party, two federal

district court decisions have adopted the exact approach proposed by the dissenting opinion below. See *United States v. Park* (N.D. Cal. 2007), Case No. CR 05-375 SI, 2007 U.S. Dist. LEXIS 40596; *United States v. Wall* (S.D. Fla., 2008), Case No. 08-60016-CR-ZLOCH, 2008 U.S. Dist. LEXIS 103058. As years pass, and as the capabilities of cell phones continue to expand, it is inevitable that this must become the majority view, if the Fourth Amendment is to provide any meaningful measure of protection for the myriad types of personal information stored in devices that are carried by approximately 80% of this nation's citizens.

### **B. A Cell Phone Is Not a Closed Container**

The trial court's suppression-motion ruling and the opinion of the court of appeals both deem the cell phone to be a type of "closed container," the contents of which can be searched incident to a lawful arrest. (Tr. 152; April 11, 2007, Judgment Entry, at p. 6.) *State v. Smith*, 2008-Ohio-3717, at ¶¶ 36-48. The premise that a closed container, seized during a lawful arrest, may be opened and searched comes from *United States v. Robinson* (1973), 414 U.S. 218, 94 S.Ct. 467 (detection and removal of heroin capsules in a cigarette pack in the suspect's clothing permissible), and *New York v. Belton* (1981), 453 U.S. 454, 101 S.Ct. 2860 (cocaine taken from coat in suspect's car was not the product of an unconstitutional search). But to even begin to compare a cell phone, capable of storing hundreds or even thousands of megabytes of information in numerous formats, with a crumpled cigarette pack or a pocket in an article of clothing borders on the ridiculous.

As noted by the *Belton* Court,

"[c]ontainer" here denotes any object capable of holding another object. It thus includes closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like. Our holding encompasses only the interior of the passenger compartment of an automobile and does not encompass the trunk.

Id., at 460, fn 4. Thus, if the police had wanted to physically open Mr. Smith's cell phone and search for contraband "objects"—for example if the battery had been removed and a small amount of contraband had been inserted in the battery compartment—then such a search would have been permissible under the United States Supreme Court case law construing warrantless searches of containers found on a suspect or within his reach. But the fact that the Beavercreek police accessed multiple files and reviewed electronically stored information, such as photographs, text messages, and telephone numbers, patently takes this case out of the realm of closed-container jurisprudence.

In the primary case relied on by the trial court and by the lead opinion in the appeals court, a federal appeals court concluded that a warrantless cell-phone search was permissible. *United States v. Finley* (5<sup>th</sup> Cir. 2007), 477 F.3d 250. But there, the unsuccessful appellant actually *agreed* that the cell phone could be viewed as a simple closed container. Mr. Smith most emphatically does not agree with that analytical approach. He would encourage this Court to review the relevant portion of the *Finley* opinion, and note the complete absence of any discussion regarding numerous functional capabilities and the data-storage capacity of a modern cell phone. Id., at 260.

But even if the closed-container approach were deemed appropriate, the delayed timing of the warrantless search herein mandates the conclusion that the search was unconstitutional. The State did not present evidence to establish that the contested search occurred at the scene of Mr. Smith's arrest. Rather, the testimony of Detective Craig Polston was that the cell phone was searched at the police station. (Supp. Tr. 33.) ("I don't remember if we looked at it at the scene or when we first got to the Police Department, but it was maybe – maybe some there at the scene, maybe some at the Police Department, but I remember the Police Department.")

Because the arrest scene was not cleared for approximately two hours after the arrest, the search of the cell phone occurred at least two hours after the arrest. (Supp. Tr. 33.) The United States Supreme Court has held that a search of a closed container that occurred approximately 90 minutes after the suspect's arrest was not a search incident to arrest, and violated the Fourth Amendment. *United States v. Chadwick* (1977), 433 U.S. 1, 15, 97 S.Ct. 2476 ("Here the search was conducted more than an hour after federal agents had gained exclusive control of the footlocker and long after respondents were securely in custody; the search therefore cannot be viewed as incidental to the arrest or as justified by any other exigency."). Thus, even utilizing an analytical approach that grossly oversimplifies the characteristics and capabilities of a cell phone, the search that occurred here was unconstitutional.

### **C. Exigent Circumstances Did Not Exist**

Neither the trial court's ruling nor the appellate court's opinion cite exigent circumstances as excusing the warrantless search. But the concurring opinion cited the "urgency" of the situation as sufficient reason for the police not to have sought a warrant. *State v. Smith*, 2008-Ohio-3717, at ¶ 51. No witness testified that if a warrant had been sought, data stored on the cell phone might be lost. If that had been a concern, it would have been a simple enough matter to turn the phone off until a warrant could be obtained.

## **CONCLUSION**

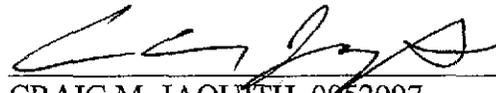
In *Terry v. Ohio*, the United States Supreme Court reaffirmed that "the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure." *Terry v. Ohio* (1968), 392 U.S. 1, 20. Further, "the burden is on those seeking [an] exemption [from the warrant requirement] to show the need for it." *United States v. Jeffers*, 342 U.S. at 51. The State could readily have obtained prior approval for the search of

Antwaun Smith's cell phone, and cannot demonstrate why its search thereof should be exempted from the Fourth Amendment's prohibition on warrantless government searches.

Therefore, Mr. Smith asks this Court to reverse the judgment of the court of appeals, and to remand his case for a new trial.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



CRAIG M. JAQUITH 0052997  
Assistant State Public Defender

250 East Broad Street – Suite 1400  
Columbus, Ohio 43215  
(614) 466-5394  
(614) 752-5167 - fax  
craig.jaquith@opd.ohio.gov

COUNSEL FOR ANTWAUN SMITH

#### CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of Appellant Antwaun Smith has been sent by regular U.S. mail, postage prepaid to Elizabeth Ellis, Assistant Greene County Prosecutor, 61 Greene Street, Second Floor, Xenia, Ohio 45385 this 13<sup>th</sup> day of April, 2009.



CRAIG M. JAQUITH 0052997  
COUNSEL FOR ANTWAUN SMITH

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No. 2008-1781
Plaintiff-Appellee,	:	
	:	On Appeal from the Greene
v.	:	County Court of Appeals
	:	Second Appellate District
ANTWAUN SMITH,	:	
	:	C.A. Case No. 07-CA-47
Defendant-Appellant.	:	

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APPENDIX TO

MERIT BRIEF OF APPELLANT ANTWAUN SMITH

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IN THE SUPREME COURT OF OHIO

08-1781

STATE OF OHIO, :  
 :  
 :  
 Plaintiff-Appellee, :  
 :  
 v. :  
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 :  
 ANTWAUN SMITH, :  
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 :  
 Defendant-Appellant. :

Case No. \_\_\_\_\_  
  
On Appeal from the Greene  
County Court of Appeals  
Second Appellate District  
  
Court of Appeals  
Case No. 07-CA-47

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NOTICE OF APPEAL OF ANTWAUN SMITH

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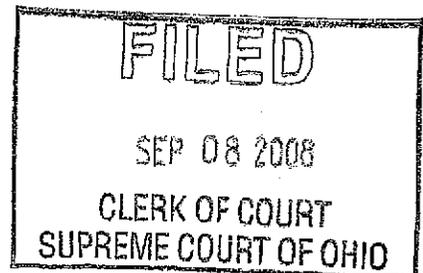
OFFICE OF THE OHIO PUBLIC DEFENDER

CRAIG M. JAQUITH 0052997  
Assistant State Public Defender  
(Counsel of Record)  
8 East Long Street  
Columbus, Ohio 43215  
(614) 466-5394  
(614) 752-5167 -- fax  
[craig.jaquith@opd.ohio.gov](mailto:craig.jaquith@opd.ohio.gov)

COUNSEL FOR APPELLANT

ELIZABETH ELLIS 0074332  
Assistant Greene County Prosecutor  
61 Greene Street, 2<sup>nd</sup> Floor  
Xenia, Ohio 45385  
(937) 562-5250  
(937) 562-5107 - fax

COUNSEL FOR APPELLEE



**NOTICE OF APPEAL OF ANTWAUN SMITH**

Antwaun Smith hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Greene County Court of Appeals, Second Appellate District, entered in Court of Appeals Case No. 07-CA-47, on July 25, 2008.

This case raises a substantial constitutional question, involves a felony, and raises an issue of public or great general interest.

Respectfully submitted,

OFFICE OF THE  
OHIO PUBLIC DEFENDER



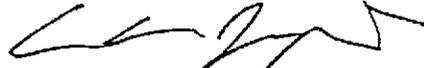
CRAIG M. JAQUITH 0052997  
Assistant State Public Defender  
(Counsel of Record)

8 East Long Street  
Columbus, Ohio 43215  
(614) 466-5394  
(614) 752-5167 – fax  
[craig.jaquith@opd.ohio.gov](mailto:craig.jaquith@opd.ohio.gov)

COUNSEL FOR APPELLANT

**CERTIFICATION OF SERVICE**

This is to certify that a copy of the foregoing Notice of Appeal of Antwaun Smith was forwarded by regular U.S. Mail, postage prepaid to the office of Elizabeth Ellis, Assistant Greene County Prosecutor, 61 Greene Street, 2<sup>nd</sup> Floor, Xenia, Ohio 45385, on this 8<sup>th</sup> day of September, 2008.



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CRAIG M. JAQUITH 0052997  
Assistant State Public Defender

COUNSEL FOR APPELLANT

FILED

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COURT OF APPEALS  
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
GREENE COUNTY

STATE OF OHIO

Plaintiff-Appellee

v.

ANTWAUN SMITH

Defendant-Appellant

Appellate Case No. 07-CA-47

Trial Court Case No. 07-CR-73

(Criminal Appeal from  
Common Pleas Court)

.....  
OPINION

Rendered on the 25<sup>th</sup> day of July, 2008.  
.....

STEPHEN K. HALLER, Atty. Reg. #0009172, by ELIZABETH A. ELLIS, Atty. Reg. #0074332, Greene County Prosecutor's Office, 61 Greene Street, Second Floor, Xenia, Ohio 45385

Attorneys for Plaintiff-Appellee

J. ALLEN WILMES, Atty. Reg. #0012093, 4428 North Dixie Drive, Dayton, Ohio 45414

Attorney for Defendant-Appellant

.....  
BROGAN, J.

Antwaun Smith appeals from his conviction for trafficking in cocaine, two counts of possession of criminal tools, possession of cocaine, and tampering with evidence.

08-07-3852

COMPUTER

THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT

COPY TO COA  
DATE 07/28/2008

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 a Wendy Northern in Beavercreek, Ohio. Ms. Northern had been transported to Miami Valley Hospital as a result of a possible drug overdose. Detectives Polston and Scott Molnar responded to the hospital to interview Ms. Northern. While at the hospital, Ms. Northern was asked about her drug supplier and if she would cooperate with detectives and place phone calls to her supplier to set up a controlled buy. Ms. Northern agreed to cooperate. Ms. Northern told detectives that her drug supplier, to whom she referred as "Capo" or Antwaun, had been riding as a passenger in a vehicle a few weeks earlier that had been stopped down the street from her home, and was cited for possessing a small amount of marijuana. 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 Smith. Polston then showed a BMV photo of Smith to Northern, and she identified Smith as her drug supplier. The detectives took Ms. Northern to the police station to get a written statement and to get her to place some controlled phone calls. Detective Polston asked Ms. Northern to call Capo and request an ounce of crack cocaine. They further asked her to tell Smith to bring the cocaine to her house because she did not have access to transportation. She complied, and the police recorded the conversation. During the phone conversation, Smith agreed to come to Ms. Northern's home to deliver an ounce of crack cocaine. Smith did not show up until much later than expected and while Ms. Northern was being transported back to the Greene County jail, she received a call from Smith telling her that he was in her driveway. This information was immediately relayed to other police officers on the scene.

08-07-3853

While in the driveway of the home, Smith and his two passengers were ordered out of the vehicle at gunpoint. Officer Shawn Williams ordered Smith to walk diagonally back toward his voice. When ordered to put his hands up, Smith did not initially comply. (Tr. 208-209.) Officer Williams testified there was "a good two to four second time span" where Smith's hands weren't visible. (Tr. 212.) Smith "took a few shuffle steps back with his hands where [Officer Williams] still could not see [his hands]." (Tr. 214-215.) During this time, there were three to six inches of snow on the ground and it was dark outside. (Tr. 216.) No crack cocaine was found on Smith's person at the time of his arrest. Crack cocaine was ultimately discovered two hours later under the snow in a footprint left by Smith when he exited the vehicle. Smith was arrested at the scene. The officers searched Smith incident to his arrest and recovered \$2,500 in cash and a cell phone. Police searched Smith's cell phone prior to booking him into jail, and it revealed that Smith had called Ms. Northern twice, once just before the police arrested him. Police also recovered a crack pipe, some digital scales and a marijuana blunt inside the vehicle Smith had been driving.

Prior to trial, Smith moved to suppress the evidence discovered by the police on his cell phone. The trial court overruled Smith's motion upon the authority of *United States v. Finley* (C.A.5, 2007), 477 F.3d 250, certiorari denied (2007), 127 S.Ct. 2065, 167 L.Ed.2d 790, and admitted evidence of the call records and phone numbers retrieved from Smith's phone. Those records demonstrated that the number of the cell phone matched a number provided to the police by Ms. Northern. Furthermore, the cell phone contained Ms. Northern's home phone number and cell phone numbers.

08-07-3854

This matter proceeded to a trial by jury on March 26, 2007, at the conclusion of which Smith was found guilty of one count of trafficking in cocaine, two counts of possession of criminal tools, one count of possession of cocaine, and one count of tampering with evidence. The court sentenced Smith to a total of 12 years imprisonment, of which eight years is a mandatory term.

Smith has filed a timely appeal from this conviction and sentence, assigning the following errors for our review:

I. "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ENTERING A FINDING OF GUILTY TO THE CHARGE OF AGGRAVATED TRAFFICKING IN CRACK COCAINE AND TO THE CHARGE OF TAMPERING WITH EVIDENCE WHEN SAID FINDING WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

II. "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ENTERING A FINDING OF GUILTY TO THE CHARGES OF POSSESSION OF AN ILLEGAL SUBSTANCE (CRACK COCAINE) AND TAMPERING WITH EVIDENCE WHICH VERDICT WAS NOT SUPPORTED BY EVIDENCE AND SO IS CONTRARY TO LAW."

III. "DUE TO TRIAL COUNSEL'S FAILURE TO OBJECT TO IMPROPER QUESTIONS AND COMMENTS OF THE PROSECUTOR, APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AND THUS WAS DENIED A FAIR TRIAL HEREIN."

IV. "COMMENTS BY THE PROSECUTOR BOTH DURING TESTIMONY AND DURING CLOSING ARGUMENT REPRESENTED MISCONDUCT AND SERVED TO DENY APPELLANT DUE PROCESS."

08-07-3855

V. "THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY REFUSING TO SUPPRESS THE USE OF CELL PHONE RECORDS ILLEGALLY SEIZED FROM APPELLANT."

I.

Smith argues his convictions for aggravated trafficking and tampering with evidence are against the manifest weight of the evidence. He contends the State failed to produce evidence that he sold or offered to sell crack cocaine to Wendy Northern. He argues that no one saw him in possession of crack cocaine or tamper with any evidence.

We agree with the State that Smith's conviction for aggravated trafficking in cocaine is not against the manifest weight of the evidence. The jury heard the recorded conversation in which Smith agreed to provide the cocaine to Northern. R.C. 2925.03(A)(1) provides that no one shall knowingly sell or offer to sell a controlled substance. Crack cocaine is a controlled substance. Our review of the record demonstrates that Smith offered to sell an ounce of cocaine to Northern. We have listened to the recordings of Ms. Northern's cell phone conversations with Smith held on January 21, 2007. The following statements can be gleaned from those conversations:

Northern: "[mumbling]"

Smith: "I'm still trying to get a way out there. If I do, what do you want me to do?"

\*\*\*

Northern: "[mumbling]"

Smith: "You used to paying, you used to going \*\*\* somebody else, getting

08-07-3856

it for lower, and I don't have it for that."

\*\*\*

Northern: "[mumbling] \*\*\* can I get something?"

Smith: "Yep, you know you can without even asking."

Northern: "[mumbling]"

Smith: "Uh, um, I'm going to try to make it to you."

\*\*\*

Northern: "[mumbling]"

Smith: "Yeah, yeah, yeah, um , I got it. I'll have it for you. I gotta get a way out, I gotta get a way out there."

Northern: "[mumbling]"

Smith: "As soon as I get a way, a licensed driver, I'll bring it straight out there to you \*\*\* I'll make sure I'll get it to you. I can get it out there to you today before 5:00."

Northern: "[mumbling]"

Smith: "I promise. Hey, you know I'm taking a hell of a risk, but I'm a doing this because of you."

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Tampering with evidence as provided in R.C. 2921.21(A)(1) states in part that no person knowing that an investigation is in progress shall alter, destroy, conceal or remove anything with purpose to impair its value or availability as evidence in such investigation. The State presented evidence that shortly after Smith offered to sell cocaine to Northern, he was arrested by the police at Northern's residence. There was circumstantial evidence

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that Smith dropped the cocaine in the snow before he could be taken into custody. These actions by Smith support his convictions for tampering with evidence and aggravated trafficking. *State v. Diana* (1976), 48 Ohio St.2d 199. The Appellant's first assignment is Overruled.

II.

In his second assignment, Smith argues his conviction for possession of cocaine is based on insufficient evidence. Insufficient evidence is evidence which would raise a reasonable doubt of the defendant's guilt in the average mind of a juror. *State v. Jenks* (1991), 61 Ohio St.3d 259. The State presented circumstantial evidence that Smith dropped the cocaine, recovered in the snow, in the area where he exited his vehicle. It was Smith who, after all, offered to sell the cocaine to Northern and he was about to deliver it to Northern when he was apprehended. Smith's conviction for possession of cocaine was based on sufficient evidence. The second assignment of error is likewise Overruled.

III.

In his third assignment, Smith contends his trial counsel was ineffective in failing to object to certain testimony presented by the State. Specifically, he contends his trial counsel should have objected to Wendy Northern's testimony that she had spent \$70,000 on drugs and that drugs had ruined her life. The State argues that this testimony was not improper because the prosecutor was trying to establish Ms. Northern's relationship with Smith. We agree with Smith that the testimony was not particularly relevant. Ms. Northern testified she spent approximately \$70,000 in the past year on crack cocaine, but purchased

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crack cocaine for three months before she met Smith. In any event, the jury undoubtedly knew that drug addicts spend enormous amounts of money to feed their addiction.

Smith contends his trial counsel was also ineffective for not objecting to Detective Polston's testimony that Northern told him that Smith had been stopped in her neighborhood earlier and had been arrested for possession of marijuana. The State argues that this testimony was admissible under Evid.R. 404(B) to show the defendant's identity. Polston testified he used the information for the marijuana arrest to show a BMV photograph of Smith to Northern to identify him as her drug supplier. We agree with Smith that this testimony was improper, but the jury was immediately informed that Smith's arrest for possession of marijuana should have no bearing on their decision.

Smith argues his trial counsel should have objected to the unflattering "thug-like" photograph taken of him when he was arrested, and the testimony that police recovered a holster for a gun, digital scales, a crack pipe, and a marijuana blunt in the vehicle. Smith contends that since he did not own the vehicle he was driving, some of the items found in the vehicle should not have been the subject of the officer's testimony. The State argues that the outcome of the trial would not have been different had the items found in the car Smith was driving not been mentioned. We agree. The photograph taken of the defendant at the time of his arrest was relevant however unflattering it might have been.

Finally, Smith contends his trial counsel should have objected to the prosecutor's statements in the rebuttal argument wherein he stated, "you have undoubtedly seen enough shows to know that if the police had done something, violation of Mr. Smith's rights, you wouldn't even know about the evidence." (Tr. 464.) The prosecutor was undoubtedly referring to defense counsel's argument that the police did not have a search warrant or

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consent from Smith as authority to search his cell phone. The prosecutor's response was not improper. Smith has failed to demonstrate that his trial counsel's performance fell below an objective standard of reasonableness or that, if he did err, the outcome of the trial would have been different but for those errors in judgment. *Strickland v. Washington* (1984), 466 U.S. 668. The Appellant's third assignment is also Overruled.

IV.

In his fourth assignment, Smith argues that the prosecutor engaged in misconduct in making certain remarks during the trial. Specifically, he contends the prosecutor bolstered the credibility of Ms. Northern by commenting "touche" when after Ms. Northern refused to identify Smith in the courtroom, she told the prosecutor she identified his voice on the audiotape and questioned why the prosecutor asked her to again identify Smith as her drug supplier. The prosecutor was merely commenting that Ms. Northern was correct in pointing out the question by the prosecutor was unnecessary.

Next, Smith complains of the prosecutor's comment in final argument "is it beyond the realm of possibility that the defendant brought crack cocaine to a crack cocaine sale?" The State argues that the prosecutor was merely pointing out that Smith's presence at Ms. Northern's house was not happenstance, but in response to her request that he sell her the cocaine. We agree the remark was not improper. The fourth assignment of error is Overruled.

V.

In his fifth assignment, Smith argues the trial court erred in refusing to suppress the evidence found on his cell phone. Specifically, Smith asserts that the police search of his

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cell phone was unreasonable because the police had ample opportunity to obtain a search warrant for the contents of his cell phone.

The trial court overruled Smith's motion upon the authority of *United States v. Finley* (C.A.5, 2007), 477 F.3d 250, certiorari denied (2007), 127 S.Ct. 2065, 167 L.Ed.2d 790. In *Finley*, the Fifth Circuit Court of Appeals upheld the warrantless search of the defendant's cell phone on facts that closely resemble those in the present matter. The police in *Finley* used a cooperating source to set up a drug buy. The defendant drove the seller, Mark Brown, to the appointed location, and the drug sale was completed with the seller who was seated in the front passenger seat. Finley drove away and was stopped by police who recovered drugs with Finley's name on a pill bottle and marked money used to purchase the drugs. Finley and Brown were both arrested, and Finley's cell phone was seized. Finley and Brown were then transported to Brown's residence where police were conducting a search pursuant to a warrant. At that location, police searched Finley's cell phone call records and messages, along with several of the text messages, which referred to narcotics trafficking.

The court of appeals found the trial court properly denied Finley's motion to suppress the cell phone evidence. The court wrote as follows:

"Although Finley has standing to challenge the retrieval of the call records and text messages from his cell phone, we conclude that the search was lawful. It is well settled that 'in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a "reasonable" search under that Amendment.' *United States v. Robinson*, 414 U.S. 218, 235, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973). Police officers are not constrained to search only for weapons

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or instruments of escape on the arrestee's person; they may also, without any additional justification, look for evidence of the arrestee's crime on his person in order to preserve it for use at trial. See *id.* at 233-34, 94 S.Ct. 467. The permissible scope of a search incident to a lawful arrest extends to containers found on the arrestee's person. *United States v. Johnson*, 846 F.2d 279, 282 (5<sup>th</sup> Cir.1988) (per curiam); see, also, *New York v. Belton*, 453 U.S. 454, 460-61, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981) (holding that police may search containers, whether open or closed, located within arrestee's reach); *Robinson*, 414 U.S. at 223-24, 94 S.Ct. 467 (upholding search of closed cigarette package on arrestee's person).

"Finley concedes that the officers' post-arrest seizure of his cell phone from his pocket was lawful, but he argues that, since a cell phone is analogous to a closed container, the police had no authority to examine the phone's contents without a warrant. He relies on *Walter v. United States*, 447 U.S. 649, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980), for this proposition. *Walter*, however, is inapposite because in that case no exception to the warrant requirement applied, see *id.* at 657, 100 S.Ct. 2395, whereas here no warrant was required since the search was conducted pursuant to a valid custodial arrest, see *Robinson*, 414 U.S. at 235, 94 S.Ct. 467. Special Agent Cook was therefore permitted to search Finley's cell phone pursuant to his arrest. Cf. *United States v. Ortiz*, 84 F.3d 977, 984 (7th Cir.1996) (upholding retrieval of information from pager as search incident to arrest). The district court correctly denied Finley's motion to suppress the call records and text messages retrieved from his cell phone." *Id.* at 259-60.

In a footnote, the court stated that the fact that the police transported Finley to Brown's residence did not alter its conclusion, citing *United States v. Edwards* (1974), 415

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U.S. 800, 803, 94 S.Ct. 1234, 39 L.Ed.2d 771. Id. at 260, fn. 6. The court noted that searches and seizures that could be made on the spot at the time of arrest may legally be concluded later when the accused arrives at the place of detention as a search incident to arrest. Consequently, the court found the search of Finley was still substantially contemporaneous with his arrest. Id.

At least one court has differed from the view expressed in *Finley*. In *United States v. Park* (N.D.Cal. 2007), No. CR 05-375 SI, 2007 WL 1521573, the court held the warrantless searches of cellular phones lawfully seized from drug defendants at the time of their arrests, conducted an hour and one-half later, were not reasonable as incident to the defendants' arrests. There, the court found, unlike the *Finley* court, that for purposes of Fourth Amendment analysis, cellular phones should be considered "possessions within an arrestee's immediate control" and not part of "the person." Id. at \*9. The court noted that this was so because modern cellular phones have the capacity to store immense amounts of private information. Id.

In reaching this conclusion, the court relied on *United States v. Chadwick* (1977), 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538, abrogated on other grounds by *California v. Acevedo* (1982), 500 U.S. 565, 111 S.Ct. 1982, 114 L.Ed.2d 619. The *Chadwick* court suppressed the search of a locked footlocker seized by police officers from the trunk of the defendants' vehicle yet not searched until approximately one hour later at the Federal Building in Boston. Finding the search impermissible under the Fourth Amendment, the Court provided the following:

"[Searches incident to custodial arrests] may be conducted without a warrant, and they may also be made whether or not there is probable cause to believe that the person

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arrested may have a weapon or is about to destroy evidence. The potential dangers lurking in all custodial arrests make warrantless searches of items within the 'immediate control' area reasonable without requiring the arresting officer to calculate the probability that weapons or destructible evidence may be involved. *United States v. Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973); *Terry v. Ohio*, [392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)]. However, warrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the 'search is remote in time or place from the arrest,' *Preston v. United States*, [376 U.S. 364, 367, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964)], or no exigency exists. Once law enforcement officers have reduced luggage or other *personal property not immediately associated with the person of the arrestee* to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest." (Emphasis added.) *Id.* at 15.

The *Park* court noted that the decision in *Chadwick* differed significantly from the Supreme Court's earlier decision in *Edwards*, where it initially recognized an exception to the requirement that a search incident to an arrest be conducted at approximately the same time as the arrest. In *Edwards*, the Court found that the delayed search of the defendant's clothing "was and is a normal incident of a custodial arrest, and reasonable delay in effectuating it does not change the fact that [the defendant] was no more imposed upon than he could have been at the time and place of the arrest or immediately upon arrival at the place of detention." *Edwards*, 415 U.S. at 805. At their core, *Edwards* and *Chadwick* created a distinction between "searches of the person" and "searches of possessions within an arrestee's control." The court in *Park* found "searches of the person" such as those in

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*Robinson and Edwards* distinguishable from the search of the defendant's cell phone in that case, providing that cell phones were more like warrantless searches of a purse, suitcase or briefcase under the exclusive control of the police where the arrestee can no longer gain access to the property to destroy evidence. *Park* at \*7, citing *United States v. Monclavo-Cruz* (C.A.9, 1981), 662 F.2d 1285, 1291 (“[P]ossessions within an arrestee's immediate control have fourth amendment protection at the station house unless the possession can be characterized as an element of the clothing, or another exception to the fourth amendment requirements applies”).

Although we acknowledge the concern that the court in *Park* places on the enormous amount of private information subject to a search of cell phones, we are inclined to agree with the trial court and find that *Finley* controls the instant matter. Here, the trial court denied Smith's suppression motion on the basis that police officers may search, without additional justification, “for evidence of the arrestee's crime on his person in order to preserve it for use at trial.” (Judgment Entry at 6.) The record indicates that the police officers obtained Smith's cell phone immediately from his person. However, it is unclear whether they searched the phone's call records and numbers at the scene of the arrest or later at the station when they were securing the evidence. The trial court's decision, to which we agree, implies that both times are substantially contemporaneous to the arrest. This reasoning encompasses the holdings in both *Finley* and *Edwards* regarding a search incident to arrest of items found on one's person. See *Finley*, 477 F.3d at 260 (“In general, as long as the administrative process incident to the arrest and custody have not been completed, a search of effects seized from the defendant's person is still incident to the defendant's arrest.”). See, also, *Edwards*, 415 U.S. at 803 (“[S]earches and seizures that

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could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention.”).

Moreover, we note that the trial court permitted only evidence pertaining to the cell phone’s call record and numbers matching those supplied by the informant, Ms. Northern. It granted, however, Smith’s motion to suppress incriminating photos also retrieved by the officers from the phone. In doing so, the court appropriately admitted only that evidence which the officers had a reasonable suspicion was on Smith’s person at the time of his arrest. Thus, the broader privacy concerns addressed in *Park* were not implicated here. See *United States v. Valdez* (E.D.Wis. Feb. 8, 2008), No. 06-CR-336, 2008 WL 360548.

Accordingly, we find that the court did not err in refusing to suppress evidence taken from Smith’s cell phone that was seized from his person incident to his arrest. Appellant’s fifth assignment of error is Overruled.

The Judgment of the trial court is Affirmed.

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FAIN, J., concurring:

Although I concur in the opinion written by Judge Brogan for the court, I write separately to explain my reason for overruling Smith’s Fifth Assignment of Error. I rest my concurrence in the overruling of this assignment of error on the narrowness of the trial court’s suppression ruling.

The trial court suppressed all evidence from the seized cell phone, except for the call record and numbers matching those supplied by the informant. I am impressed by the State’s argument that, from the standpoint of the searching officers, there was some urgency in obtaining this information. A reasonable police officer could conclude that there

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might be a limit to the number of previous phone numbers contacted on the cell phone, and that the failure to obtain those phone numbers promptly might result in their becoming purged from the cell phone's memory as new calls came in. Thus, a reasonable police officer could conclude that there were exigent circumstances justifying obtaining the phone numbers stored in the memory of the cell phone without waiting for a warrant.

The touchstone of any Fourth Amendment search and seizure is reasonableness. This is incorporated in the text of the amendment, itself: "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 Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (Emphasis added.)

I conclude that it was reasonable for the officers taking Smith into custody to search the cell phone on his person for its record of phone numbers contacted, without first obtaining a warrant. On that narrow ground, I join in overruling Smith's Fifth Assignment of Error.

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DONOVAN, J., dissenting:

I disagree with the majority's resolution of the fifth assignment of error. Criminal procedure is a constant tug-of-war between the efforts of law enforcement to prosecute lawbreakers and the safeguarding of the constitutional rights of the citizenry. The requirement of a search warrant helps address this delicate balance by ensuring that police establish probable cause in order to invade a citizen's privacy. Given the practical aspects of police work, narrowly defined exceptions to the requirement of a search warrant have

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been created to assist police in their efforts against crime. The State, however, has a perpetual obligation to demonstrate that a warrantless search was valid. That burden was not overcome in the instant case.

In somewhat broad dicta, upon which the majority partially relies, the U.S. Supreme Court stated that "[i]t is also plain that searches and seizures that could be made on the spot at the time of arrest may be legally conducted later when the accused arrives at the place of detention." *U.S. v. Edwards* (1974), 415 U.S. 800, 94 S.Ct. 4. In *Edwards*, the Court upheld the validity of a police search of the accused's clothes at the station house approximately ten hours after the arrest.

Few courts, however, have addressed the legitimacy of allowing police to search a cellular phone for evidence incident to an arrest. In *United States v. Finley* (C.A. 5, 2007), 477 F.3d 250, certiorari denied (2007), 127 S.Ct. 2065, 167 L.Ed.2d 790, as noted by the majority, the court held that the search of the defendant's cell phone was lawful as incident to an arrest. The court concluded that the cellular phone was analogous to a container that could lawfully be searched as part of a search incident to an arrest, pursuant to *New York v. Belton* (1981), 453 U.S. 454, 101 S.Ct. 2860. Because the search took place only after a short time had elapsed between the accused's arrest and transport to the new location, the court found that the search was substantially contemporaneous. 477 F.3d at 260, n. 7. Additionally, because the cellular phone was found on the accused's person, the court citing *Edwards*, above, placed the cellular phone into the category of a search of the accused's person or clothing rather than a search of a possession within the immediate control of the accused. *Id.*

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In *United States v. Park* (N.D. Cal. 2007), No. CR 05-375 SI, 2007 WL 1521573, a federal district court reasoned otherwise when addressing the warrantless search of a cellular phone. In *Park*, the accused's cellular phone was removed from him not at the time of the arrest but rather when he was entering into the police station as part of the booking process. *Park* at \*2. The phone was subsequently searched by police detectives for call records and other evidence of the accused's drug crime. *Id.* The court noted the decision in *Finley*, but disagreed that a cellular phone should be characterized as part of the accused's person but rather, as a "possession within an arrestee's immediate control." *Id.* At \*8. In essence, the *Park* court limited the broad dicta of *Edwards* to possessions that could "be characterized as an element of the clothing." *Id.* at 7. The court further distinguished *Finley* because the search there was more contemporaneous with the arrest. *Id.*

In holding that the cellular phone should be categorized as the more protected category of possessions within an arrestee's immediate control, the *Park* court cited the privacy concerns inherent in modern cellular phones. The court noted that modern cellular phones "have the capacity for storing immense amounts of private information. Unlike pagers or address books, modern cellular phones record incoming and outgoing calls, and can also contain address books, calendars, voice and text messages, email, video and pictures." *Id.* at \*8.

The majority holds that the warrantless search of Smith's cell phone was a search of his person incident to a lawful arrest. Explicitly mentioned in their holding is that the search of the cell phone was substantially contemporaneous with Smith's arrest so as to fall under an exception to the warrant requirement. The justification for such a search is

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for the protection of police (to secure items which might be used to injure the officer or effectuate an escape). *Preston v. United States* (1964), 376 U.S. 364, 367, 84 S.Ct. 881. A second basis upon which to conduct a search incident to an arrest is to prevent the destruction of evidence of crimes where said evidence is on the accused's person or within his immediate control. *Id.* Normally, a search incident to an arrest must be made contemporaneously with the arrest of the accused. "Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest." *Id.*, citing *Agnello v. United States* (1925), 269 U.S. 20, 31, 46 S.Ct. 4.

For a valid search incident to an arrest, there are two justifications – 1) to protect the police from weapons or prevent the escape of the defendant, and 2) to preserve evidence of criminal activity. Here, the second justification is relevant to the search of Smith's cellular phone.

The search of Smith's phone could not be regarded as contemporaneous. Smith's cellular phone was removed from him at the time of his arrest, but it is not apparent from the record that it was searched at or near that time. Smith was removed from the scene and booked into the jail. The police were on the scene of the arrest for as much as two hours after his arrest. No one testified with certainty as to whether the cellular phone was searched at the scene of the arrest. The detectives were certain at trial, however, that they searched the cellular phone several hours later at the station house. Several hours is not substantially contemporaneous. Additionally, the search was conducted after the accused was booked in jail and after the police had exercised complete custody over the cellular phone. Because the search was not contemporaneous, an exception to the warrant requirement must be affirmatively established.

88-07-3869A

The modern cellular phone is unlike most other things that the average citizen normally transports with him or her. It has the capacity to store and display great amounts of information: names, phone numbers, addresses, text messages, e-mails, photographs, videos. Those are some of the more basic features. Modern "smart phones" or "PDAs" can connect to a business server and access corporate data. An internet capable phone might record web browsing history. Music mp3s can be purchased, stored, and played. The divide between the personal computer and the cellular phone appears to be diminishing by the day.

The fact that the modern cellular phone is increasingly akin to a modern personal computer shows that unless directed otherwise, the cellular phone should be placed in the more protected category of possessions within the immediate control of the accused. As the court in *Park* commented, "[a]ny contrary holding could have far ranging consequences." *Park*, 2007 WL 1521573 at \*8. Strong privacy interests in the contents of a cell phone should not lay dormant until the police get around to searching it. Once contemporaneity is lost, the justifications for a valid search incident to arrest have little meaning. The police should obtain a search warrant, just as they would when they seize a personal computer from an accused.

Additionally, the State of Ohio has not established any facts that would justify a non-contemporaneous warrantless search of the phone. No one testified at the motion to suppress regarding any concerns that evidence or data from the cellular phone may have been lost or deleted if the police were required to postpone their search of the cell phone and obtain a warrant. Furthermore, the search was conducted after the accused was booked into the jail, and the police had exclusive control and custody of the cell phone.

08-07-3870

I conclude that the data retrieved from the cellular phone should have been suppressed as the result of a warrantless search. The State did not affirmatively establish that the search of the cell phone was contemporaneous with Smith's arrest as is necessary for a valid search incident to an arrest, nor did it establish that the search was justified by any other exceptions to the warrant requirement. Thus, I would reverse the trial court's decision which overruled Smith's motion to suppress in part.

Further, in a circumstantial case of this nature, the introduction of this evidence, obtained in contravention of the Fourth Amendment, was highly prejudicial, thus warranting a new trial. I would reverse and remand.

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Copies mailed to:

Stephen K. Haller  
Elizabeth A. Ellis  
J. Allen Wilmes  
Hon. Stephen Wolaver

08-07-3871

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COURT OF APPEALS  
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IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
GREENE COUNTY

STATE OF OHIO

Plaintiff-Appellee

v.

ANTWAUN SMITH

Defendant-Appellant

Appellate Case No. 07-CA-47

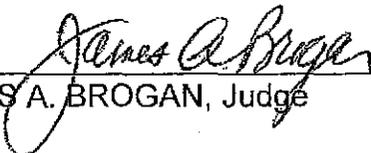
Trial Court Case No. 07-CR-73

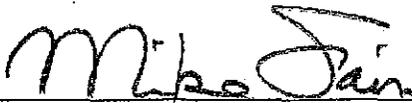
(Criminal Appeal from  
Common Pleas Court)

FINAL ENTRY

Pursuant to the opinion of this court rendered on the 25th day  
of July, 2008, the judgment of the trial court is **Affirmed**.

Costs to be paid as stated in App.R. 24.

  
\_\_\_\_\_  
JAMES A. BROGAN, Judge

  
\_\_\_\_\_  
MIKE FAIN, Judge

\_\_\_\_\_  
MARY E. DONOVAN, Judge

08-07-3872

Copies mailed to:

Steven K. Haller  
Elizabeth A. Ellis  
Greene County Prosecutor's Office  
61 Greene Street, Second Floor  
Xenia, OH 45385

J. Allen Wilmes  
4428 N. Dixie Drive  
Dayton, OH 45415

Hon. Stephen Wolaver  
Greene County Common Pleas Court  
45 N. Detroit Street  
Xenia, OH 45385-2998

08-07-3873

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GREENE COUNTY, OHIO

COMMON PLEAS COURT OF GREENE COUNTY, OHIO

STATE OF OHIO,

Plaintiff

Case No. 2007 CR 073

-vs-

ANTWAUN L. SMITH

JUDGMENT ENTRY

Defendant

\*\*\*\*\*

This matter came for hearing before the Court on March 22, 2007, upon the Defendant's Motion to Suppress filed on February 23, 2007. Present in Court were the Defendant, represented by Attorney Kevin Lennen, and Assistant Prosecuting Attorney David Hayes. The Defendant's Motion to Suppress included three branches. First, the Defendant alleged that officers did not have reasonable suspicion upon which to stop, detain, and arrest the Defendant, and overall lacked probable cause to arrest the Defendant. Secondly, the Defendant alleged that any items seized from the Defendant's person and property should be excluded as evidence due to the illegal arrest. Finally, the Defendant asked this Court to exclude as evidence any statements made by the Defendant to law enforcement officers as they were obtained as a result of the Defendant's illegal arrest.

The State of Ohio called four witnesses: Detective Craig Polston, Detective Scott Molnar, Officer Snyder, and Officer Kempf, all of the Beavercreek Police Department. The Defendant had the opportunity to cross-examine each witness, and the Defendant did not

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call any witnesses. After considering the testimony of the witnesses and the arguments of counsel, the Court makes the following findings of fact and conclusions of law.

#### FINDINGS OF FACT

On January 21, 2007 Detective Polston and Detective Molnar were notified by Sgt. McFaddin of the following events. Beaver Creek officers had responded to a suspected drug overdose at the address of 3884 Timberline Drive. Once inside, the officers found the owner of the residence suffering from a suspected drug overdose and the owner was transported to Miami Valley Hospital. Inside the residence, officers discovered what they believed to be a large amount of crack cocaine. The detectives proceeded to Miami Valley Hospital to speak to the owner identified as Wendy Sue Northern (hereinafter "Wendy"). Upon arrival, the detectives confronted Wendy with the information provided to them and persuaded her to aid them in setting up a drug deal with her supplier.

To facilitate this, Wendy provided four separate phone numbers that she used to contact her supplier whom she called "Capo". The detectives instructed Wendy to ask Capo for an ounce of crack cocaine and to have it delivered to 3884 Timberline Drive. Several phone calls were placed and a deal was setup to have "Capo" deliver an ounce of crack cocaine to 3884 Timberline Dr. Officer's Snyder and Kempf were on patrol that day and were asked by Detective Molnar to provide support in arresting "Capo" when he arrived. Det. Molnar informed the officers that a drug deal had been set-up, he provided a description of the suspect vehicle (a GMC Yukon SUV, dark in color) based upon information received from Wendy. In addition to the vehicle description, the information provided from Wendy led the detectives to identify "Capo" as Antwaun Smith. Detective Molnar provided the officers a photograph of Antwaun Smith and identified him as the suspected drug supplier.

2011-10-10

"Capo" failed to show at the scheduled time and the officers were relieved from their support roles and custody of Wendy was transferred to Officer Snyder. Officer Snyder was instructed to permit Wendy to keep her cell phone and answer it should "Capo" attempt to contact her. While Wendy was in Officer Snyder's cruiser, her cell phone rang and she answered it. She informed Officer Snyder that her drug supplier was at her residence on 3884 Timberline Drive. Officer Snyder immediately relayed this information to Officer Kempf who proceeded to that address.

Officer Kempf arrived at the address with Officer Williams of the Beavercreek Police Department. Once there, Officer Kempf observed a black GMC Yukon SUV type vehicle in the driveway with an individual in the driver's seat who matched the description and photograph previously provided by Det. Molnar. In addition, there were two other individuals in the vehicle; a black female in the front passenger seat and a black male in the back passenger seat. The officer's exited their cruisers with weapons drawn and proceeded to arrest the occupants of the vehicle.

Detective Molnar arrived on the scene shortly thereafter and handcuffed and searched Antwaun Smith. On his person, the detective discovered a cell phone, 2,500 dollars in cash, and a small amount of marijuana. No cocaine was found on the Defendant's person, however. Immediately following his arrest, Detective Polston asked the Defendant about the location of the crack cocaine, to which the Defendant responded and made statements. The Defendant was never questioned following that exchange on the scene. The Defendant was not given his Miranda warnings until after that exchange occurred. The Defendant was arrested for trafficking in cocaine and placed in a cruiser. Approximately two hours later, Detective Molnar found two baggies of suspected crack cocaine approximately two to three feet outside the driver's side door of the vehicle.

07-04-1608

Subsequently, the detectives searched the Defendant's cell phone prior to it being booked into evidence. In the phones call records they discovered that the number of that phone matched one of the numbers provided to them by Wendy. Further, the phone included Wendy's home and cell phone numbers. In addition, the phone contained several photographs of the Defendant posing with what appeared to be handguns and cocaine while wearing a bullet proof vest.

#### CONCLUSIONS OF LAW

With regard to branch one of the Defendant's Motion to Suppress; the Court finds that the Defendant was arrested by Officer's Kempf and Williams when they exited their cruisers with weapons drawn. Thus, the officers must have had probable cause to place the Defendant under arrest. Probable cause exists when a reasonably prudent person would believe that the person to be arrested has committed a crime. Beck v. Ohio, 379 U.S. 89, 85. In the instant case, the officers had sufficient probable cause to place the defendant under arrest. Officer Kempf testified that he was informed of the drug deal and its location, he was provided with a description of the suspect and the suspect vehicle, and that upon arriving at 3884 Timberline Drive, the vehicle he observed matched the description as did the individual in the driver's seat. Further, Officer Snyder indicated that she relayed to Officer Kempf that Wendy informed her that the person they had been waiting for was in her driveway, and Officer Kempf reported to the residence immediately after receiving this information. Based upon the foregoing, probable cause existed to arrest the Defendant. Thus, the Court overrules branch one of the Defendant's Motion to Suppress.

With regard to branch two, the Defendant is seeking to suppress the cash and cell phone found on his person, in addition to the narcotics found on the scene outside the vehicle as fruits of the illegal arrest. Specifically, the Defendant seeks to suppress what the officers found while searching the cell phone – the phone numbers and the photographs.

With regard to the cash and the phone itself, the Court specifically finds that the Defendant was lawfully under arrest, and therefore, his person could be searched incident to arrest. Therefore, the cash and the cell phone will be admitted into evidence. With regard to the narcotics, the Court specifically finds that the drugs were found outside the presence of the Defendant on the ground. The Defendant has no privacy interest in narcotics laying on the ground and he has not asserted one here.

With regard to the items recovered from the cell phone. The Court notes that there is a dearth of Ohio case law regarding whether or not a warrant is required to search the contents of a cell phone that is seized pursuant to a lawful arrest. However, the Court has found one Federal case directly on point. In United States v. Finley, 477 F.3d 250, the Fifth Circuit Court of Appeals addressed the question of whether or not a warrantless search of the call records and text messages from a lawfully seized cell phone was itself unlawful. Accepting that the defendant had standing to contest the search, the Court concluded the following:

Although Finley has standing to challenge the retrieval of the call records and text messages from his cell phone, we conclude that the search was lawful. It is well settled that "in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." United States v. Robinson, 414 U.S. 218, 235, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973). Police officers are not constrained to search only for weapons or instruments of escape on the arrestee's person; they may also, without any additional justification, look for evidence of the arrestee's crime on his person in order to preserve it for use at trial. See id. at 233-34, 94 S.Ct. 467. The permissible scope of a search incident to a lawful arrest

07-04-1610

extends to containers found on the arrestee's person. United States v. Johnson, 846 F.2d 279, 282 (5th Cir.1988) (per curiam); see also New York v. Belton, 453 U.S. 454, 460-61, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981) (holding that police may search containers, whether open or closed, located within arrestee's reach); Robinson, 414 U.S. at 223-24, 94 S.Ct. 467 (upholding search of closed cigarette package on arrestee's person).

Finley concedes that the officers' post-arrest seizure of his cell phone from his pocket was lawful, but he argues that, since a cell phone is analogous to a closed container,;B0066;B0066 [FN6] the police had no authority to examine the phone's contents without a warrant. He relies on Walter v. United States, 447 U.S. 649, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980), for this proposition. Walter, however, is inapposite because in that case no exception to the warrant requirement applied, see id. at 657, 100 S.Ct. 2395, whereas here no warrant was required since the search was conducted pursuant to a valid custodial arrest, see Robinson, 414 U.S. at 235, 94 S.Ct. 467. Special Agent Cook was therefore permitted to search Finley's cell phone pursuant to his arrest.;B0077;B0077Cf. United States v. Ortiz, 84 F.3d 977, 984 (7th Cir.1996) (upholding retrieval of information from pager as search incident to arrest). The district court correctly denied Finley's motion to suppress;B0088;B0088 the call records and text messages retrieved from his cell phone.

The Court finds the Fifth Circuits reasoning persuasive. The Defendant has a reasonable expectation of privacy in the contents of his cell phone. However, based upon the foregoing, the Court finds that in conducting a search incident to an arrest, police officers "...are not constrained to search only for weapons or instruments of escape on the arrestee's person; they may also, without any additional justification, look for evidence of the arrestee's crime on his person in order to preserve it for use at trial." U.S. v. Finley, supra.

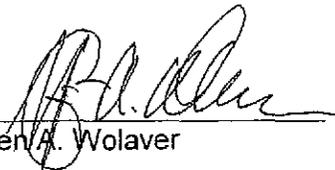
Therefore, the Court will admit the call records and phone numbers retrieved from the Defendant's cell phone, however, because the photographs recovered from the cell phone had nothing to do with the present offense, the Court will exclude them.

With regard to Branch three, the Court finds, based upon the testimony of the officers, that the Defendant was under arrest and in custody when Detective Polston asked him the question regarding the location of the narcotics, therefore, any statements made in

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response to that questions and prior to the Defendant being read his Miranda rights are excluded from evidence at trial.

IT IS SO ORDERED.

  
\_\_\_\_\_  
Judge Stephen A. Wolaver

Copies to: Greene County Prosecutor's Office, 61 Greene St., Xenia, OH  
John Rion, 130 W. Second St., Suite 2150, P.O. Box 10126, Dayton,  
OH

07-04-1412

IN THE COMMON PLEAS COURT OF GREENE COUNTY, OHIO

STATE OF OHIO,  
Plaintiff

2007 AP 26 PM 12:08

CASE NO. 2007-CR-0073

-vs-

TERRI A. MAZUR, CLERK  
COMMON PLEAS COURT  
GREENE COUNTY, OHIO

JUDGMENT ENTRY  
(Sentencing)

ANTWAUN SMITH,  
Defendant

On the 26th day of April 2007, the Defendant, Antwaun Smith was present in open Court with his counsel John Meehling, with David Hayes representing the State of Ohio, for sentencing pursuant to O.R.C. §2929.19.

The Court finds the Defendant has been convicted accordingly:

- Count I: a violation of O.R.C. §2925.03(A), Trafficking in Cocaine, a felony of the first degree, with mandatory imprisonment;
- Count II: a violation of O.R.C. §2923.24(A), Possession of Criminal Tools, a felony of the fifth degree;
- Count III: a violation of O.R.C. §2923.24(A), Possession of Criminal Tools, a felony of the fifth degree;
- Count IV: a violation of O.R.C. §2925.11(A), Possession of Cocaine, a felony of the first degree, (merges with Count I);
- Count V: a violation of O.R.C. §2921.12(A)(1), Tampering with Evidence, a felony of the third degree;

subject to a presumption in favor of prison under division (D) of §2929.13 of the Ohio Revised Code, having been found guilty by jury verdict on the 28th day of March 2007.

The Court addressed the defendant and asked him if he wished to make a statement in his own behalf or present any information in mitigation of punishment. The Court afforded counsel an opportunity to speak on behalf of the Defendant, as required by Criminal Rule 32(A)(1).

The Court has considered the record, oral statements, any victim impact statement, as well as the principles and purposes of sentencing under O.R.C. §2929.11, and has balanced the seriousness and recidivism factors pursuant to O.R.C. §2929.12.

The Court finds pursuant to O.R.C. §2929.13(B) (find one of the following):

- physical harm to person;
- attempt or threat with a weapon;

COMPUTER

COMPUTER-34

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JUDGMENT (SENTENCING)

RE: ANTWAUN SMITH  
CASE NO: 2007-CR-0073

- attempt or threat of harm and previous conviction for physical harm;
- public trust, office or position;
- for hire, or organized crime;
- sex offense;
- previous prison term served;
- offender already under a community control (non-prison) sanction or on bond;
- offense committed while in possession of firearm;

and the Court further finds the defendant is not amenable to community control and prison is consistent with the purposes of O.R.C. §2929.11.

Therefore, IT IS THE ORDER OF THE COURT the defendant be sentenced to the Ohio Department of Rehabilitation and Correction (CORRECTIONAL RECEPTION CENTER) accordingly:

- Count I: for a definite period of 8 years for the violation of O.R.C. §2925.03(A), Trafficking in Cocaine, a felony of the first degree, with mandatory imprisonment;
- Count II: for a definite period of 11 months for the violation of O.R.C. §2923.24(A), Possession of Criminal Tools, a felony of the fifth degree;
- Count III: for a definite period of 11 months for the violation of O.R.C. §2923.24(A), Possession of Criminal Tools, a felony of the fifth degree;
- Count IV: for a definite period of no sentence (merges with Count I) for the violation of O.R.C. §2923.24(A), Possession of Cocaine, a felony of the first degree;
- Count V: for a definite period of 4 years for the violation of O.R.C. §2921.12(A)(1), Tampering with Evidence, a felony of the third degree;

said sentences in Counts I and III are to be served consecutively to each other but concurrently to Counts II and III for a total sentence of 12 years of which 8 years is a mandatory term pursuant to O.R.C. §2929.13(F), 2929.14(D), or Chapter 2925; and pay a mandatory fine in the sum of \$10,000.00, after considering O.R.C. §2929.18. The defendant is entitled to jail time credit of 96 days as of this date along with future custody days while Defendant awaits transportation to the state institution.

The Court has further notified the defendant post release control is mandatory in this case up to a maximum of 5 years, as well as the consequences for violating conditions of post release control imposed by the Parole Board under O.R.C. §2967.28. The defendant is ordered to serve as part of this sentence any term of post release control imposed by the Parole Board, and any prison term for violation of post release control.

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JUDGMENT (SENTENCING)

RE: ANTWAUN SMITH  
CASE NO: 2007-CR-0073

Pursuant to Criminal Rule 32 the Defendant is hereby notified of his right to appeal. If the Defendant is unable to pay the cost of an appeal, the Defendant has the right to appeal without payment. If the Defendant is unable to obtain counsel for an appeal, counsel will be appointed without cost. If the Defendant is unable to pay the costs of documents necessary to an appeal, the documents will be provided without cost. The defendant has a right to have a notice of appeal timely filed on his behalf.

The Court has considered the defendant's present and future ability to pay financial sanctions. Pursuant to O.R.C. §2929.18(D) the Court imposes a financial sanction of restitution as an Order in favor of the victim(s) of the offender's criminal act in the amount of \$ 0 that can be collected through execution as described in division (D)(1) of O.R.C. §2929.18. The offender shall be considered for purposes of the collection as a Judgment Debtor. The Defendant is ordered to pay restitution of \$ 0, all costs of prosecution (Court costs etc.), and any fees permitted pursuant to O.R.C. §2929.18(A)(4). Pursuant to O.R.C. 2929.18(A)(1), the Defendant is ordered to pay a 5% surcharge on the amount of restitution, payable to the Clerk of Courts for the collecting and processing of restitution payments. Costs of proceedings are assessed against the Defendant for which execution is hereby awarded. All bonds posted in this matter are Ordered released, in accordance with O.R.C. §2947.23 and O.R.C. §2937.40.

Pursuant to O.R.C. §2925.03, the defendant's operator's license is ORDERED suspended for a period of 5 years.

Pursuant to HB 163, the defendant is ORDERED to pay \$125.00 to the Beavercreek Police Department for reimbursement costs for the laboratory analysis of evidence in this case.

Pursuant to O.R.C. §2901.07, the Defendant is ordered to submit to the collection of a DNA specimen.

According to §2929.19(B)(3)(f) of the O.R.C. the defendant is required not to ingest nor be injected with a drug of abuse. You are on notice that you are subject to random drug testing; and the results of said testing shall be made a part of your record.

The Defendant is REMANDED to the custody of the Sheriff of Greene County, Ohio, for transportation to the Institution, according to law.

IPP is approved / not approved, sentence given is appropriate.

*Shu*

APPROVED:

*[Signature]*  
Common Pleas Judge

07-04-3879

FILED

The Supreme Court of Ohio

JAN 28 2009

CLERK OF COURT  
SUPREME COURT OF OHIO

State of Ohio

Case No. 2008-1781

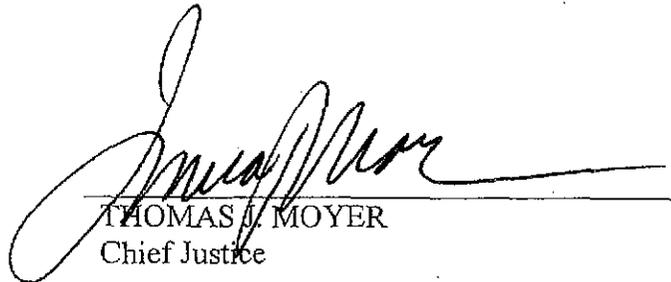
v.

ENTRY

Antwaun Smith

Upon consideration of the jurisdictional memoranda filed in this case, the Court accepts the appeal. The Clerk shall issue an order for the transmittal of the record from the Court of Appeals for Greene County, and the parties shall brief this case in accordance with the Rules of Practice of the Supreme Court of Ohio.

(Greene County Court of Appeals; No. 07CA47)



THOMAS J. MOYER  
Chief Justice

UNITED STATES OF AMERICA, Plaintiff, v. EDWARD PARK, et al., Defendants.

No. CR 05-375 SI

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2007 U.S. Dist. LEXIS 40596

May 23, 2007, Decided

**PRIOR HISTORY:** *United States v. Minho Thomas Cho*, 2006 U.S. Dist. LEXIS 94535 (N.D. Cal., Dec. 22, 2006)

**COUNSEL:** [\*1] For Edward Wook Sung Park (17), Defendant: Anna Ling, J. Tony Serra, LEAD ATTORNEYS, San Francisco, CA.

For USA, Plaintiff: Andrew M. Scoble, LEAD ATTORNEY, Alexis Hunter, United States Attorney's Office, San Francisco, CA; Stephanie M. Hinds, Assistant United States Attorney, San Francisco, CA.

**JUDGES:** SUSAN ILLSTON, United States District Judge.

**OPINION BY:** SUSAN ILLSTON

**OPINION**

**ORDER GRANTING DEFENDANT PARK'S MOTION TO SUPPRESS CELL PHONE SEARCH**

On October 27, 2006 and February 2, 2007, the Court heard argument on defendant Park's motion to suppress the warrantless search of his cellular phone.<sup>1</sup> After careful consideration of the parties' arguments, the Court GRANTS the motion.

1 Co-defendants Brian Ly, David Lee and Darriek Hom have joined in the motion. Defendants Ly and Lee were arrested along with Park, and all three had cell phones searched that day under similar circumstances. However, defendant Hom was not present or arrested, and did not have a cell phone searched. Thus, defendant Hom does not have standing to join the instant motion.

[\*2] In sum, the Court finds the government has not met its burden to show that any exception to the warrant requirement applies. As an initial matter, the Court notes that the record is ambiguous, and somewhat conflicted, regarding exactly when and how officers searched defendants' cellular phones. It is clear, however,

that the station house searches of defendants' cellular phones occurred approximately an hour and a half after their arrests, and thus were not roughly contemporaneous with the arrests. Under these circumstances, such delayed searches would be lawful if they are considered "searches of the person," as opposed to "searches of possessions within an arrestee's immediate control." *United States v. Chadwick*, 433 U.S. 1, 16 n.10, 97 S. Ct. 2476, 53 L. Ed. 2d 538 (1977). The Court finds that a modern cellular phone, which is capable of storing immense amounts of highly personal information, is properly considered a "possession within an arrestee's immediate control" rather than as an element of the person. As such, the Court concludes that once officers seized defendants' cellular phones at the station house, they were required to obtain a warrant to conduct the searches.

The Court further finds [\*3] that the searches were not "booking searches" because the government has admitted that the searches were "surreptitious" and investigatory, and the government has not demonstrated that the searches were conducted pursuant to standard police department procedures.

**BACKGROUND**

On December 1, 2004, San Francisco Police Inspectors John Keane, David Martinovich, Martin Halloran, Ted Mullin, Officer Gary Watts and several narcotics officers executed a search warrant at 922 Capitol Street in San Francisco. *See* Keane Decl., Ex. 1 (Narrative of Police Incident Report). The search warrant authorized the search of defendant Asa Lee Barnla and of 922 Capitol Street, San Francisco, California.

Prior to executing the search warrant, the officers set up surveillance of 922 Capitol Street. *Id.* Officers saw defendant Enrique Chan enter 922 Capitol Street, and then leave with a large bag and box; he was detained after driving away. *Id.* While Chan was detained, defendants Park and Ly arrived at 922 Capitol Street and went inside. *Id.* Next, officers observed defendant Chi Hac drive up, park outside 922 Capitol, look towards Officers Keane and Martinovich, and then drive away. [\*4] *Id.* Officers detained Hac. *Id.* Officers then saw defendant

David Lee exit 922 Capitol Street; he too was detained pending service of the search warrant. *Id.* Finally, officers saw Park and Ly leave 922 Capitol Street and return to their vehicle; they also were detained pending service of the search warrant. *Id.*

The officers then executed the search warrant at 922 Capitol Street. *Id.* Officers found evidence of an indoor marijuana cultivation operation, and they seized marijuana, growth medium, mail, and equipment used to grow marijuana. *Id.* The officers arrested Park, Chan, Ly, Lee, and Barnla. *Id.* <sup>2</sup> The "Field Arrest Cards" for Park and Ly state that they were arrested at 5:00 p.m., and the card for Lee states that he was arrested at 5:05 p.m. *See* Supp. Mullin Decl., Ex. 1. No officers seized or searched any of defendants' cellular phones at the time of their arrests. *Id.* PP 4, 9; Supp. Halloran Decl. PP 5-7; Supp. Watts Decl. PP 4, 6.

2 Keane states that Hac was detained but later released at Taraval Station pursuant to *California Penal Code Section 849(b)* for lack of evidence to arrest. *Id.* P 6.

[\*5] After defendants were arrested, they were transported to Taraval Police Station for booking. *Id.* P 5. Officer Watts and Inspector Mullin have submitted declarations stating that when Park, Ly and Lee were booked, their property, including cell phones, was removed from them and placed into envelopes for safe keeping pursuant to standard SFPD booking procedures. *See* Watts Decl. P 7; Supp. Mullins Decl. P 7. Watts describes those procedures as follows:

Once at the Booking Counter, the Booking Officer, who records and takes an arrested person's property, obtains information about the arrested person and their arrest from the Searching or Arresting Officer. Information, including the arrested person's name, address, place of arrest, criminal charges, name and star numbers of the arresting and searching officers, the date, place, and time of booking, and the personal property taken from the arrested individual, is obtained and recorded on a SFPD Form 3800-09, otherwise known as a "Booking Form." . . .

While at the Booking Counter, the Searching Officer removes or instructs the arrested person to remove all of his/her personal property and place the property [\*6] on the Booking Counter. The Booking Officer then records on the Booking Form all of the personal property taken from the arrested person. Any property

taken from the arrested person is then placed in an envelope.

A copy of the Booking Form and a "Field Arrest Card" are attached to the outside of the envelope. The envelope is then taken for safe keeping for the arrested person by the Booking Officer. The envelope containing the arrested person's property will be transported along with the arrested person to the jail where the person will be held on the criminal charges underlying his/her arrest.

At the Booking Counter, the Booking Form is normally signed by the Booking Officer, Searching Officer, and the arrested person, unless the arrested person refuses to sign the form. The arrested person's signature on the form is merely an acknowledgment that property was taken from them.

Watts Decl. P 6(a), (c)-(e). Watts does not state that it was standard procedure to search the contents of cellular phones in connection with the booking process. Park, Ly and Lee all signed their respective Booking Forms. *See* Watts Decl. Ex. 1 (Park); Martinovich Decl. Ex. 2 (Ly); Supp. [\*7] Mullin Decl. Ex. 2 (Lee).

The officers' declarations are vague, however, as to specific circumstances surrounding the searches of defendants' cellular phones. Inspector Martinovich searched Lee's phone, and at Martinovich's direction, Officer Halloran searched Park's and Ly's cell phones. Martinovich states,

I believe that I requested that the cellular telephones of Chan, Lee, Barnla, Park and Ly be searched at Taraval station during the booking process. First, I know as noted above that standard SFPD booking procedure requires the inventorying of all personal property and the inspection of all containers in order to deter theft of arrestees' property and false claims of theft by arrestees, and to identify contraband and other dangerous items. Second, in my cases in the Narcotics Division, I often make sure that cellular telephones seized during booking are searched because they often contain evidence relevant to the investigation. In regards to this specific case, it was my belief that evidence of marijuana trafficking and/or cultivation might be found in each of the cellular

telephones, especially since I had been investigating the marijuana trafficking and cultivation activities [\*8] of Chan, Park, Lee and Barnla prior to their arrests on December 1, 2004. Moreover, based on my training and experience, I believed that a search of the cellular telephones at the police station during the booking process was permissible as a booking search.

December 22, 2006 Martinovich Decl. P 6. Aside from this oblique reference by Martinovich, the government has not submitted any evidence that it is standard SFPD procedure to search the contents of cell phones as part of a booking search.

With respect to the search of Lee's cellular phone, Martinovich states,

With specific regards to Lee, I searched his T-Mobile Sidekick II cellular telephone, having number 341-7908. I searched the address book of the cellular telephone and recorded the names and telephone numbers of individuals whose information appeared in the cellular telephone. Attached hereto as Exhibit 1 is an accurate and complete copy of the front and back side of the piece of paper containing the names and telephone numbers that I recovered from Lee's cellular telephone.

I do not recall searching Lee's cellular telephone for "in-coming and out-going" calls. It is my general practice to record "in-coming [\*9] and out-going" calls when I search an arrestee's cellular telephone. Given the fact that I made no notation of "in-coming and out-going" calls on Exhibit 1, I do not believe that I conducted such a search. I also do not recall searching the cellular telephone for information stored or accessed via the internet, or, for photographs, videos, calendars, email or text messages, or any other stored data.

Lee's Booking Form, which is attached as Exhibit 2 to the Declaration of Ted Mullin . . . indicates that he was booked at 18:30 hours. I do not recall the specific time that I conducted the search of his cellular telephone and I did not note the time of the search on Exhibit 1 at-

tached hereto. Nonetheless, I believe that I retrieved and searched his telephone before it was sealed in the property envelope and taken by the station Booking Officer for safe keeping for Lee because I did not have access to the cellular telephone thereafter.

*Id.* PP 7-9.

Halloran describes his search of Park's cell phone as follows:

Specifically with regard to Park, I believe that he had a cell phone on his person at the time of his arrest. Following his arrest, but before [\*10] his personal property was taken by the Booking Officer at Taraval Station for safe keeping for Park, I retrieved and searched Park's Verizon Wireless cell phone, having telephone number (415) 516-2771.

I wrote down on a piece of paper the names and telephone numbers of individuals whose information appeared in Park's cell phone. Attached hereto as Exhibit 1, is an accurate and complete copy of the piece of paper containing the names and telephone numbers that I retrieved from Park's cell phone. On Exhibit 1, I also made the following notations: "12-01-04 @ CO I" and "18:44 hrs." The notation "12-01-04 @ CO I" is a reference to December 1, 2004; the date that I searched the cell phone. The notation "@ CO I" is a reference to Company I of Taraval Station; the place where the search was conducted. Lastly, "18:45 hrs" refers to the time when I searched the cell phone's memory.

Halloran Decl. PP 6-7. Halloran notes that although Park's Booking Form states that he was booked and his personal property was taken at "18:30 hours,"

I believe that the booking time denoted on the form is actually an approximation of the time he was booked and his property was taken. I also [\*11] believe that Park's personal property, including his cell phone, was taken by the Booking Officer after I searched the cell phone's memory at 18:45 hours (i.e. 6:45 p.m.). I believe this to be the case because I did

not have access to Park's cell phone after it was placed in a property envelope and taken by the Booking Officer.

*Id.* P 9.

Finally, Halloran describes the search of Ly's cell phone as follows:

Specifically with regard to Ly, before his personal property was taken by the station Booking Officer for safe keeping for Ly, I retrieved and searched his T-Mobile Sidekick II, having telephone number (415) 359-5011. . . .

I do not recall the specific time that I searched Ly's cellular telephone and I did not note the time of the search on Exhibit 1 attached hereto. Moreover, I do not recall whether I searched Park's cellular telephone before Ly's or vice versa.

Ly's Booking Form indicates that he was booked and his personal property taken at "18:30 hours" on December 1, 2004. . . I believe that the booking time noted on the form is an approximation of the time Ly was booked and his property was taken. I further believe that Ly's cellular [\*12] telephone and other personal property were taken by the Booking Officer after I searched the cellular telephone. I believe this to be true because just as in the case of Park's cellular telephone, I did not have access to Ly's cellular phone after it was taken by the Booking Officer.

Supp. Halloran Decl. PP 10, 12-13.

The officers do not detail exactly how, or when, during the booking process they seized and searched defendants' cell phones. With regard to 6:30 p.m. "booking time" listed on the Booking Forms, Watts also states,

I do not recall Park and Ly being processed at the Booking Center at the same time, nor do I recall them being processed at the Booking Center at the same time as Chan, Lee, or Barnla. I believe that all five individuals were processed one at a time. Moreover, I believe that there was some lapse in time between the booking of all five individuals because the other officers and I who processed their arrests

and executed the search warrants were performing various tasks, such as: completing reports and other paperwork related to the search warrant and their arrests, searching the individuals at the Booking Counter, searching their cellular telephones, [\*13] and/or processing evidence seized pursuant to the search warrant at 922 Capitol Street.

Supp. Watts Decl. P 7.

The confusion regarding exactly when and how defendants' cell phones were searched is exacerbated by the April 2005 affidavit by DEA Special Agent Christopher Fay. Fay submitted this affidavit to Judge Marilyn Hall Patel in support of a wiretap application, and the government previously filed the Fay Affidavit in opposition to a motion to suppress challenging the wiretap. In describing the December 1, 2004 arrest of defendants, Fay states,

At the time of their arrests, Asa Lee BARNLA, Enrique CHAN, David LEE, Brian Heng Lun LY, and Edward Wook Sung PARK were all found to have cellular telephones on their persons. *These cellular telephones were seized and surreptitiously searched incident to the arrests, and were then returned to the owners.*

April 2005 Fay Aff. P 75 (Docket No. 276, attached as Ex. A to Scoble Decl.) (emphasis added). The government's papers do not address Fay's statement, nor does the government attempt to reconcile the apparent discrepancy between Fay's description of the searches with the version contained in the officers' declarations.

#### [\*14] DISCUSSION

Defendants move to suppress the warrantless search and seizure of their cellular phones. The government defends the searches of the cellular phones on two bases. First, the government contends that officers lawfully searched the cell phones incident to defendants' arrests. Second, the government contends that the searches were lawful "booking searches." As set forth below, the Court finds that the government has not met its burden to establish that either exception to the warrant requirement applies.

##### 1. Search Incident to Arrest<sup>3</sup>

<sup>3</sup> The government appears to concede that defendants have a reasonable expectation of privacy

in their cell phones, and accordingly the Court does not address this issue.

The *Fourth Amendment* protects individuals against unreasonable searches and seizures. *U.S. Const. Amend. IV*. A search conducted without a warrant is "per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions." *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973) [\*15] (citations omitted). The government bears the burden of establishing that a warrantless search was reasonable and did not violate the *Fourth Amendment*. *United States v. Carbajal*, 956 F.2d 924, 930 (9th Cir. 1992), cert. denied, 510 U.S. 900, 114 S. Ct. 272, 126 L. Ed. 2d 223 (1993)(citations omitted).

A "search incident to arrest" is an exception to the general rule against warrantless searches. See *United States v. Hudson*, 100 F.3d 1409, 1419 (9th Cir. 1996). The justification for permitting a warrantless search is the need of law enforcement officers to seize weapons or other things which might be used to assault an officer or effect an escape, as well as the need to prevent the loss or destruction of evidence. See *id.* "A search incident to arrest must be conducted at about the same time as the arrest." *Id.* (citations and quotations omitted).

In *United States v. Edwards*, 415 U.S. 800, 805, 94 S. Ct. 1234, 39 L. Ed. 2d 771 (1974), the Supreme Court recognized an exception to the contemporaneity requirement and authorized the warrantless search of a suspect's clothes which occurred ten hours after the arrest at the police station house. In *Edwards*, the police took an arrestee's [\*16] clothes to examine them for evidence of a crime. The court noted that the police had probable cause to believe the defendant's clothing was evidence, and held that taking such evidence "was and is a normal incident of a custodial arrest, and reasonable delay in effectuating it does not change the fact that Edwards was no more imposed upon than he could have been at the time and place of the arrest or immediately upon arrival at the place of detention." *Id.* at 805.

In contrast, in *United States v. Chadwick*, 433 U.S. 1, 97 S. Ct. 2476, 53 L. Ed. 2d 538 (1977),<sup>4</sup> officers seized a locked footlocker at the time of an arrest and searched the locker approximately an hour later. The Supreme Court suppressed the search, reasoning:

Warrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the search is remote in time or place from the arrest, or no exigency exists. Once law enforcement officers have reduced luggage or other personal property not immediately associated with

the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the [\*17] property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest.

*Id.* at 15 (internal citations and quotations omitted). The *Chadwick* court distinguished *Edwards* as follows, "[u]nlike searches of the person, *United States v. Robinson*, 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973); *United States v. Edwards*, 415 U.S. 800, 94 S. Ct. 1234, 39 L. Ed. 2d 771 (1974), searches of possessions within an arrestee's immediate control cannot be justified by any reduced expectations of privacy caused by the arrest." *Id.* 433 U.S. at 16 n.10 (internal citations omitted).<sup>5</sup>

4 *Chadwick* was abrogated on other grounds by *California v. Acevedo*, 500 U.S. 565, 111 S. Ct. 1982, 114 L. Ed. 2d 619 (1982) (overruling *Chadwick* as to containers within a vehicle and holding police may search a container within a vehicle without a warrant if they have probable cause to believe that the container itself holds contraband or evidence). *Chadwick's* holding that a search incident to arrest must not be too remote in time or place is still good law.

5 *Robinson* upheld the search of a cigarette case found on an arrestee.

[\*18] After *Edwards* and *Chadwick*, courts evaluating delayed searches incident to arrest have distinguished between "searches of the person," such as the search of clothing in *Edwards* or the cigarette case in *Robinson*, and "searches of possessions within an arrestee's control," such as the footlocker in *Chadwick*. For example, in *United States v. Monclavo-Cruz*, 662 F.2d 1285 (9th Cir. 1981), a defendant was arrested in her car and an officer seized a purse that was either in her hand, on her lap, or on the car seat at the time of the arrest. The officer did not search the purse at the time of the arrest, but instead searched the purse approximately an hour later at the police station. The Ninth Circuit held that the search was not a valid search incident to arrest:

We understand [*Chadwick*] to mean that once a person is lawfully seized and placed under arrest, she has a reduced expectation of privacy in her person. Thus, a search of a cigarette case on the person is lawful once the person is under arrest without reference to any possible danger to the police, *United States v. Robinson*, 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d

427 (1973); and the search of [\*19] a person's clothes taken from him at the jail the day after his arrest is also lawful simply as reasonable jailhouse procedure. *United States v. Edwards*, 415 U.S. 800, *supra*. In reliance on this line of authority, we approved the warrantless search of an arrested person's wallet taken from his person. *United States v. Passaro*, 624 F.2d at 943; *United States v. Ziller*, 623 F.2d at 562-63. We find it significant that the *Passaro* court characterized the wallet of the arrested person as an "element of his clothing." *Passaro*, 624 F.2d at 944.

Relying on *Passaro* and *Ziller*, the government contends that a purse on the lap at the time of arrest is much like a wallet in the pocket, and thus the warrantless search of the purse should be upheld. We disagree.

Although we recognize that there is a fine line between a wallet on the person and a purse within an arrestee's immediate control, we hold that possessions within an arrestee's immediate control have *fourth amendment* protection at the station house unless the possession can be characterized as an element of the clothing, or another exception to the *fourth amendment* [\*20] requirements applies. Monclavo-Cruz' purse, like a suitcase or briefcase in which a suspect has a *fourth amendment* interest at the station house, cannot be characterized as an element of her clothing or person, even if it were on her lap at the time of arrest. Although the officer had a right under *Belton* to search the purse taken from the car at the time of Monclavo-Cruz' arrest, we hold that the officer had no right to conduct a warrantless search of the purse at the station house.

*Id.* 662 F.2d at 1291 (citations omitted).

Neither the Supreme Court nor the Ninth Circuit has addressed whether officers may search the contents of a cellular phone as a search incident to arrest, and the Court is aware of only one circuit court case on the issue, *United States v. Finley*, 477 F.3d 250 (5th Cir. 2007). In *Finley*, officers arrested the defendant and a passenger in the defendant's car after effecting a traffic stop. Officers seized the defendant's cellular phone at the time of the arrest, and then transported the defendant to the passen-

ger's residence; while at the residence, officers searched the call records and text messages on the defendant's cellular phone, [\*21] and questioned him about those records and messages. The *Finley* court held that although the police had moved the defendant, the search was "still substantially contemporaneous with his arrest," and therefore permissible. *Id.* at 260 n.7. The court also held that "Finley's cell phone does not fit into the category of 'property not immediately associated with [his] person' because it was on his person at the time of arrest." *Id.* (quoting *Chadwick*, 433 U.S. at 15).

The facts in *Finley* differ slightly from the facts here, since in *Finley* the search of defendant's cell phone at the passenger's residence was "substantially contemporaneous" with defendant's arrest; here, the search of the cell phone was not contemporaneous with arrest. More fundamentally, however, this Court finds, unlike the *Finley* court, that for purposes of *Fourth Amendment* analysis cellular phones should be considered "possessions within an arrestee's immediate control" and not part of "the person." *Chadwick*, 433 U.S. at 16 n. 10. This is so because modern cellular phones have the capacity for storing immense amounts of private information. Unlike pagers [\*22] or address books, modern cell phones record incoming and outgoing calls, and can also contain address books, calendars, voice and text messages, email, video and pictures. <sup>6</sup> Individuals can store highly personal information on their cell phones, and can record their most private thoughts and conversations on their cell phones through email and text, voice and instant messages.

6 In this case, two of the searched phones were T-Mobile Sidekick IIs; in addition to address books, these phones feature e-mail accounts, text messaging, cameras, instant messaging, Internet capability, and video caller ID. The Court takes judicial notice of these features. See <http://www.t-mobile.com/shop/phones/detail.aspx?tp=tb2&device=154e9bca-a74c-4299-99eb-48a1159c922b>.

Any contrary holding could have far-ranging consequences. At the hearing, the government asserted that, although the officers here limited their searches to the phones' address books, the officers could have searched any information -- such as emails or messages [\*23] -- stored in the cell phones. In addition, in recognition of the fact that the line between cell phones and personal computers has grown increasingly blurry, the government also asserted that officers could lawfully seize and search an arrestee's laptop computer as a warrantless search incident to arrest. As other courts have observed, "the information contained in a laptop and in electronic

storage devices renders a search of their contents substantially more intrusive than a search of the contents of a lunchbox or other tangible object. A laptop and its storage devices have the potential to contain vast amounts of information. People keep all types of personal information on computers, including diaries, personal letters, medical information, photos and financial records." *United States v. Arnold*, 454 F. Supp. 2d 999, 1004 (C.D. Cal. 2006).<sup>7</sup>

7 In *Arnold*, District Judge Dean Pregerson held that a border search of the private and personal information stored on a traveler's computer hard drive or electronic storage devices is intrusive and therefore requires a heightened level of suspicion to be reasonable. Ordinarily, neither a warrant nor probable cause is required for ordinary searches of persons or things crossing the border. Judge Pregerson granted a motion to suppress such a search, and noted that "opening and viewing confidential computer files implicates dignity and privacy interests," and that "some may value the sanctity of private thoughts memorialized on a data storage device above physical privacy." *Id.* at 1003. The government has appealed this decision and the appeal is currently pending.

[\*24] The searches at issue here go far beyond the original rationales for searches incident to arrest, which were to remove weapons to ensure the safety of officers and bystanders, and the need to prevent concealment or destruction of evidence. See generally *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969). Inspector Martinovich stated that he initiated the searches because "evidence of marijuana trafficking and/or cultivation might be found in each of the cellular telephones." Martinovich Decl. P 6. Officers did not search the phones out of a concern for officer safety, or to prevent the concealment or destruction of evidence. Instead, the purpose was purely investigatory. Once the officers lawfully seized defendants' cellular phones,<sup>8</sup> officers could have sought a warrant to search the contents of the cellular phones.

8 There is no dispute that the officers lawfully seized the cellular phones as part of the booking process.

The Court recognizes that subsequent cases have extended *Chimel's* reach [\*25] beyond its original rationales. See generally *United States v. Thornton*, 541 U.S. 615, 624-35, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004) (concurrences and dissent discussing extension of *Chimel*). However, absent guidance to the contrary from the Ninth Circuit or the Supreme Court, this Court is unwilling to further extend this doctrine to authorize the

warrantless search of the contents of a cellular phone -- and to effectively permit the warrantless search of a wide range of electronic storage devices -- as a "search incident to arrest." Cf. *id.* at 632 ("When officer safety or imminent evidence concealment or destruction is at issue, officers should not have to make fine judgments in the heat of the moment. But in the context of a general evidence-gathering search, the state interests that might justify any overbreadth are far less compelling.") (Scalia, J., concurring in the judgment).

In addition to *Finley*, the government cites a handful of unpublished cases upholding searches of cell phones, see *United States v. Brookes*, 2005 U.S. Dist. LEXIS 16844, 2005 WL 1940124 (D.V.I. June 16, 2005), and *United States v. Cote*, 2005 U.S. Dist. LEXIS 11725, 2005 WL 1323343 (N.D. Ill. May 26, 2005), as well [\*26] as cases upholding searches of pagers. See *United States v. Ortiz*, 84 F.3d 977 (7th Cir. 1996); *United States v. Chan*, 830 F. Supp. 531, 534 (N.D. Cal. 1993). The Court finds that these cases are either not persuasive or are distinguishable. *Brookes* upheld the search of a cell phone as similar to a search of a pager in that both searches were "searches of a person." *Brookes*, 2005 U.S. Dist. LEXIS 16844, 2005 WL 1940124 at \*3. *Cote* upheld a cell phone search on the ground that cell phones, address books and wallets "would contain similar information." *Cote*, 2005 U.S. Dist. LEXIS 11725, 2005 WL 1323343 at \*6.

For the reasons stated *supra*, due to the quantity and quality of information that can be stored on a cellular phone, a cellular phone should not be characterized as an element of individual's clothing or person, but rather as a "possession[] within an arrestee's immediate control [that has] fourth amendment protection at the station house." *Monclavo-Cruz*, 662 F.2d at 1291.

The cases involving searches of pagers are distinguishable. The *Ortiz* court found that the search was necessary to prevent the destruction of evidence. See *Ortiz*, 84 F.3d at 984 [\*27] ("Because of the finite nature of a pager's electronic memory, incoming pages may destroy currently stored telephone numbers in a pager's memory. The contents of some pagers also can be destroyed merely by turning off the power or touching a button."). Here, the government does not contend, and the record does not show, that the searches of defendants' cell phones were necessary to prevent the destruction of evidence. In *Chan*, officers seized and searched a pager within "only minutes" of the defendant's arrest, as opposed to the more than hour and a half delay in this case. See *Chan*, 830 F. Supp. at 536. Further, the Court finds that the searches in *Ortiz* and *Chan* implicated significantly fewer privacy interests given the technological differences between pagers and modern cellular phones.

## 2. Booking search

The government also defends the cell phone searches as "booking searches," which is a related but distinct exception to the warrant requirement. In *Illinois v. Lafayette*, 462 U.S. 640, 643-44, 103 S. Ct. 2605, 77 L. Ed. 2d 65 (1983), the Supreme Court upheld the warrantless search of a purse-type shoulder bag at the police station following the defendant's [\*28] arrest. The court explained that this type of search is a form of inventory search which "is not an independent legal concept but rather an incidental administrative step following arrest and preceding incarceration." *Id.* at 644. The court explained the legitimate governmental interests served by booking searches:

A range of governmental interests support an inventory process. It is not unheard of for persons employed in police activities to steal property taken from arrested persons; similarly, arrested persons have been known to make false claims regarding what was taken from their possession at the stationhouse. A standardized procedure for making a list or inventory as soon as reasonable after reaching the stationhouse not only deters false claims but also inhibits theft or careless handling of articles taken from the arrested person. Arrested persons have also been known to injure themselves -- or others -- with belts, knives, drugs or other items on their person while being detained. Dangerous instrumentalities -- such as razor blades, bombs, or weapons -- can be concealed in innocent-looking articles taken from the arrestee's possession. The bare recital [\*29] of these mundane realities justifies reasonable measures by police to limit these risks -- either while the items are in police possession or at the time they are returned to the arrestee upon his release. Examining all the items removed from the arrestee's person or possession and listing or inventorying them is an entirely reasonable administrative procedure.

*Id.* at 646. Booking searches must be performed pursuant to standardized criteria, *id.* at 648, and "[t]he policy or practice governing inventory searches should be designed to produce an inventory." *Florida v. Wells*, 495 U.S. 1, 4, 110 S. Ct. 1632, 109 L. Ed. 2d 1 (1990). The Supreme Court has instructed that "an inventory search must not be a ruse for a general rummaging in order to

discover incriminating evidence." *Id.*; see also *United States v. Feldman*, 788 F.2d 544, 553 (9th Cir. 1986) ("An inventory search will not be sustained where the court believed that the officers were searching for incriminating evidence of other offenses.").

Here, the government has not submitted any police department guidelines or criteria showing that it is standard practice to search the contents of [\*30] cellular phones as part of the booking procedure. The government has submitted declarations from the officers involved in the arrest of defendants describing "standard SFPD procedure"; as noted *supra*, however, the only declaration that specifically discusses searching cellular phones is from Inspector Martinovich, who states,

It is standard SFPD procedure to (1) obtain from the arrested person all personal property on his/her person and in his/her possession; (2) to have the personal property placed on the Booking Counter so that the items can be inspected and inventoried; and (3) to inspect any and all containers on or associated with the arrested person. This procedure avoids the risk of theft by police employees as well as false claims by arrested persons that their property was stolen by the SFPD. It also allows the searching officers to identify and seize contraband and items that would pose a danger to police or the arrested person. In my experience, it is also usual for the arresting officer(s) to assist in the process of removing and searching items of personal property and noting them for inventorying during the booking process. In my experience, this includes [\*31] searches of wallets, address books, cellular telephones, back packs, and purses.

Martinovich Decl. P 5.

The Court finds that the government has not met its burden to show, by a preponderance of the evidence, that it is standard police practice to search the contents of a cellular phone as part of the booking process. Martinovich's declaration, which states that it is his "experience" that such searches are routine, does not establish that such booking searches are "performed pursuant to standardized criteria," *Illinois*, 462 U.S. at 648, or that "[t]he policy or practice governing inventory searches should be designed to produce an inventory." *Florida*, 495 U.S. at 4. Further, the Court notes that the record belies the government's assertion that the searches of the cell phones here were conducted pursuant to "standard"

booking procedures. DEA Special Agent Christopher Fay's April 2005 affidavit, submitted to Judge Patel in support of a wiretap application, states that defendants "cellular telephones were seized and *surreptitiously* searched incident to the arrests, and were then returned to the owners." April 2005 Fay Aff. P 75 (Docket [\*32] No. 276, attached as Ex. A to Scoble Decl.).

Indeed, the government has not articulated any reason why it is necessary to search the contents of a cell phone in order to fulfill any of the legitimate governmental interests served by a booking search: namely, to deter theft of arrestees' property and false claims of theft by arrestees, and to identify contraband and other items. As the Supreme Court has noted, the purpose of a booking search is to create an inventory of an arrestee's belongings; here, the officers could achieve this purpose simply by listing defendants' cell phones as items on the booking forms. Unlike other "closed containers," such as purses or bags which might contain contraband or weapons, there is no possibility that a cell phone will contain any dangerous instrumentalities.

More importantly, the record demonstrates that the purpose of the search of the cell phones was investigative. Martinovich admits in his declaration that he directed the officers to search the cell phones because he believed that evidence of marijuana trafficking and/or cultivation might be found in the cellular telephones. The Court is not persuaded by Martinovich's rote recitation of

other [\*33] legitimate purposes of a booking search because, as discussed above, those legitimate interests have no applicability to a cell phone search.

The government cites *United States v. Diaz*, 2006 WL 319770 (N.D. Cal. Nov. 2, 2006) (Alsup, J.). In that case, Judge Alsup upheld a stationhouse search of a cell phone on the grounds that it was incident to booking and also authorized under the defendant's probationary search condition. However, *Diaz* is distinguishable because *Diaz* involved a probationary search. As Judge Alsup recognized, "[b]ecause probation is a form of criminal sanction, the probationer's reasonable expectation of privacy is diminished." *Id.* at \*2.

### CONCLUSION

For the foregoing reasons and for good cause shown, the Court hereby GRANTS the motion to suppress. (Docket Nos. 477, 579 & 581). Because defendant Hom was not arrested and did not have a cellular phone searched, the Court DENIES Hom's joinder in Park's motion. (Docket No. 582).

### IT IS SO ORDERED.

Dated: May 23, 2007

SUSAN ILLSTON

United States District Judge

UNITED STATES OF AMERICA, Plaintiff, vs. AARON WALL IV, Defendant.

CASE NO. 08-60016-CR-ZLOCH

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF  
FLORIDA

2008 U.S. Dist. LEXIS 103058

December 22, 2008, Decided  
December 22, 2008, Entered

**PRIOR HISTORY:** *United States v. Wall*, 2008 U.S. Dist. LEXIS 104413 (S.D. Fla., Dec. 12, 2008)

**COUNSEL:** [\*1] For Aaron Wall, IV, DOB \*1976\* USMS 77539-004, Defendant (2): Bruce S. Harvey, LEAD ATTORNEY, Atlanta, GA; Richard Francis Della Fera, LEAD ATTORNEY, Entin & Della Fera, Fort Lauderdale, FL.

For USA, Plaintiff: Terry Lindsey, LEAD ATTORNEY, United States Attorney's Office, Fort Lauderdale, FL.

**JUDGES:** WILLIAM J. ZLOCH, United States District Judge.

**OPINION BY:** WILLIAM J. ZLOCH

**OPINION**

**ORDER**

THIS MATTER is before the Court upon Defendant Aaron Wall IV's First Particularized Motion To Suppress Evidence And Statements (DE 63). An evidentiary hearing was held on October 6, 2008. The Court has carefully reviewed said Motion and the entire court file and is otherwise fully advised in the premises.

Defendant Aaron Wall IV sought to suppress evidence obtained by law enforcement and asserted three arguments: 1) all evidence seized from Wall's person should be suppressed because law enforcement did not have probable cause to arrest him; 2) the post-arrest statements made by Wall should be suppressed because they were made after an illegal arrest and without valid notice of his *Miranda* rights; and 3) all information, including text messages, seized from Wall's cell phones should be suppressed because law enforcement failed to [\*2] obtain a search warrant. At the conclusion of the hearing, the Court granted the instant Motion to the extent it sought suppression of text messages seized from Wall's cell phones and denied the Motion in all other

respects. The Court enters this Order to articulate its reasoning.

#### I. Background

In January of 2008, co-Defendant Robert Allan began discussing a plan to purchase several kilograms of cocaine from an individual who, unbeknownst to Defendants, was acting as a cooperating source (hereinafter "CS") for the Drug Enforcement Administration (hereinafter "DEA"). Allan and the CS engaged in cell phone conversations, and on January 10, 2008, Allan and Wall drove from Georgia to South Florida to purchase the cocaine. During the trip, Allan made several cell phone calls to the CS. Upon their arrival, Allan and Wall checked into a motel for the night. The next day, Allan received another call from the CS, who informed him that a representative of the CS, an undercover DEA agent (hereinafter "UC"), would complete the transaction. Later that day, Allan received a call from the UC, and during the conversation Allan gave the phone to Wall to take down directions from the UC.

Upon arriving [\*3] at the meeting place in a pickup truck, Wall dropped off Allan, who walked to an agreed upon location where he met the UC. Wall remained in the truck as the UC and Allan discussed the deal. After receiving the go ahead from Allan, Wall drove over and parked next to the UC's car. Allan then opened the rear passenger side door and showed the UC a bag filled with cash. Thereafter, the UC gave a takedown signal and Allan and Wall were arrested by DEA agents. Law enforcement performed a search of their persons and the truck incident to the arrest. Among the items recovered from Wall were two cell phones, admitted at trial as Government's Exhibits 10 and 11.

After the arrest, law enforcement advised Wall of his *Miranda* rights, and Wall signed a document waiving those rights, introduced at trial as Government's Exhibit 8. After waiving his *Miranda* rights, Wall made the following vague inculpatory statement: "I had to pay the bills, and I did something." During the booking process, DEA Special Agent Dave Mitchell performed a search of

the cell phones recovered from Wall. Agent Mitchell discovered and photographed several text messages on the phones.

## II. Analysis

### A.

The Court finds that the facts [\*4] and circumstances leading up to Wall's arrest are sufficient to constitute probable cause for the arrest. All that is required is "a reasonable ground for belief of guilt," *Maryland v. Pringle*, 540 U.S. 366, 371, 124 S. Ct. 795, 157 L. Ed. 2d 769 (2003), that is, a "probability, and not a prima facie showing, of criminal activity." *Illinois v. Gates*, 462 U.S. 213, 235, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). Further, based on the testimony and evidence, which the Court found credible, Wall made a knowing and intelligent waiver of his *Miranda* rights. Thus, the Court will neither suppress the evidence seized incident to Wall's arrest in its entirety, nor his post-arrest statement. *Pringle*, 540 U.S. at 371.

### B.

Criminal defendants have the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." *U.S. Const. amend. IV*. As a general rule, a search by a police officer is only reasonable if he first obtains a warrant from a neutral and detached magistrate authorizing the search. *Coolidge v. New Hampshire*, 403 U.S. 443, 449-53, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971); *Mincey v. Arizona*, 437 U.S. 385, 390, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978). However, there are certain "specifically established and well-delineated exceptions" to the warrant requirement. *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967).

First, [\*5] upon a lawful custodial arrest, police may search the individual and the area within his reach. *United States v. Robinson*, 414 U.S. 218, 224, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973). This can include the passenger compartment of the vehicle in which he was riding immediately prior to his arrest. *New York v. Belton*, 453 U.S. 454, 460-61, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981). Such a search incident to a lawful arrest "is not only an exception to the warrant requirement of the *Fourth Amendment*, but it is also a 'reasonable' search under that Amendment." *Id.* at 459 (quoting *Robinson*, 414 U.S. at 235). A warrantless search incident to arrest is justified by the need to remove weapons and prevent the concealment or destruction of evidence. *Id.* at 457. Thus, to be upheld, a search incident to arrest must be contemporaneous to the arrest. *Holmes v. Kucynda*, 321 F.3d 1069, 1083 (11th Cir. 2003) (search of bedroom invalid as incident to arrest because not contemporaneous with, or conducted in vicinity of, arrest).

Second, when a suspect is brought to the station-house for booking and detention, law enforcement may remove and itemize all property found on the person or otherwise in his possession. *Illinois v. Lafayette*, 462 U.S. 640, 646, 103 S. Ct. 2605, 77 L. Ed. 2d 65 (1983). One of the key [\*6] government interests supporting such inventory searches is the need to account for all property in an arrested person's possession to guard against theft or false claims as to what was taken by the police. *Id.* During an inventory search, it is customary for officers to sift through bags and purses to document the contents inside. *Id.*

Third, a search may be conducted without a warrant consistent with the *Fourth Amendment* when exigent circumstances exist, such as the threat that evidence will be destroyed. *United States v. Reid*, 69 F.3d 1109 (11th Cir. 1995). Such searches are justified by the futility of seeking out a judicial officer to obtain a warrant before crucial evidence is destroyed. *See, e.g., Warden v. Hayden*, 387 U.S. 294, 298-99, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967) (upholding evidence obtained in a warrantless search because the "*Fourth Amendment* does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others"). Thus, an exception to the warrant requirement exists when evidence is in danger of being destroyed before a warrant can be obtained.

The instant Motion (DE 63) presents the question of whether an exception to the *Fourth Amendment* [\*7] warrant requirement permits law enforcement to search the information stored on a cell phone without a warrant. <sup>1</sup> There is no guidance from the Eleventh Circuit on this issue, and the majority of caselaw relevant to this case concerns searches of pagers, not cell phones. *See, e.g., United States v. Ortiz*, 84 F.3d 977, 984 (7th Cir. 1996). The concern that evidence may be destroyed has shaped how courts have dealt with warrantless searches of pagers and cell phones.

1 The Government does not contest that the viewing of Wall's text messages by Agent Mitchell constitutes a "search" within the meaning of the *Fourth Amendment*.

The Seventh Circuit has permitted the admission of phone numbers found on a pager during a warrantless search at the time of the arrest. *United States v. Ortiz*, 84 F.3d 977, 984 (7th Cir. 1996). The court reasoned that pagers have a finite memory, and new incoming pages can potentially destroy previously stored numbers. *Id.* Thus, the court there found it necessary for law enforcement to immediately search pagers to prevent the destruction of evidence. *Id.* The Fifth Circuit has extended the holding of *Ortiz* to searches of cell phones. *United States v. Finley*, 477 F.3d 250, 260 (5th Cir. 2007). [\*8]

However, the *Finley* court did not explain why cell phones should be treated the same as pagers for purposes of the *Fourth Amendment*.

After the *Finley* opinion was entered, a court in the Northern District of California distinguished cell phones from pagers and suppressed the information retrieved from the cell phones. *United States v. Park*, 2007 U.S. Dist. LEXIS 40596, 2007 WL 1521573 (N.D. Cal. 2007). In *Park*, the court found that cell phones can store a great quantity of information, and the government made no showing that the search was necessary to prevent the destruction of evidence. 2007 U.S. Dist. LEXIS 40596, [WL] at \*9. The court further found that the search of the cell phones could not be considered an inventory search, because such searches are used to document possessions of a person in custody, not as a "ruse for a general rummaging in order to discover incriminating evidence." 2007 U.S. Dist. LEXIS 40596, [WL] at \*10 (quoting *Florida v. Wells*, 495 U.S. 1, 4, 110 S. Ct. 1632, 109 L. Ed. 2d 1 (1990)).

To determine if the search was valid, the Court has considered whether a search incident to an arrest, an inventory search, or exigent circumstances provide an exception to the warrant requirement in this case. Further, the Court has taken into account the testimony Agent Mitchell gave at the evidentiary [\*9] hearing regarding his reasons for searching the cell phones for text messages: 1) he regularly performs searches as an investigative measure because it is common to find evidence of a crime in text messages; 2) it is a standard practice of the DEA and is authorized by the DEA Legal Department so long as the search is performed during the booking process; 3) he was concerned that the text messages might expire after a certain amount of time; and 4) the cell phone battery may die.

The Court declines to adopt the reasoning of *Finley* and extend law to provide an exception to the warrant requirement for searches of cell phones. The search of the cell phone cannot be justified as a search incident to lawful arrest. First, Agent Mitchell accessed the text messages when Wall was being booked at the station-house. Thus, it was not contemporaneous with the arrest. *Kucynda*, 321 F.3d at 1082. Also, the justification for this exception to the warrant requirement is the need for officer safety and to preserve evidence. *Agnello v. United States*, 269 U.S. 20, 30, 46 S. Ct. 4, 70 L. Ed. 145 (1925) (recognizing the long-held right of law enforcement "to find and seize things connected with the crime . . . as well as weapons and [\*10] other things to effect an escape from custody"). The content of a text message on a cell phone presents no danger of physical harm to the arresting officers or others. Further, searching through information stored on a cell phone is analogous to a search of a sealed letter, which requires a warrant. See

*United States v. Jacobsen*, 466 U.S. 109, 114, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984).

The Court further finds that the search of text messages does not constitute an inventory search. The purpose of an inventory search is to document all property in an arrested person's possession to protect property from theft and the police from lawsuits based on lost or stolen property. This of course includes cell phones. However, there is no need to document the phone numbers, photos, text messages, or other data stored in the memory of a cell phone to properly inventory the person's possessions because the threat of theft concerns the cell phone itself, not the electronic information stored on it. Surely the Government cannot claim that a search of text messages on Wall's cell phones was necessary to inventory the property in his possession. Therefore, the search exceeded the scope of an inventory search and entered the territory [\*11] of general rummaging. *Wells*, 495 U.S. at 4.

Regarding the potential for destruction of evidence, at the evidentiary hearing the Government failed to establish that the text messages at issue would have been destroyed absent Agent Mitchell's intervention. The differences in technology between pagers and cell phones cut to the heart of this issue. The technological developments that have occurred in the last decade, since *Ortiz* was decided, are significant. Previously, there was legitimate concern that by waiting minutes or even seconds to check the numbers stored inside a pager an officer ran the risk that another page may come in and destroy the oldest number being stored. This was based on a platform of first-in-first-out storage of numbers used for pagers. Text messages on cell phones are not stored in the same manner. Although there was limited testimony as to how cell phones store text messages, because neither the Government nor the Defendant called an expert in such matters to testify, DEA Special Agent Richard Newsome testified that if a text message is not deleted by the user, the phone will store it. He further stated that his phone contained messages that were at least two [\*12] months old.

Based on the evidence adduced at the hearing, the Government failed to bear its burden of proving any exigent circumstances surrounding the search for the text messages. Once Wall was in the custody of police officers, and the phones were removed from his possession, he could no longer exercise any control over them. Thus, the threat that messages would be destroyed was extinguished once law enforcement gained sole custody over the phones. Further, Agent Mitchell did not have a reasonable basis for believing that text messages would have been destroyed in the interim if a warrant was obtained. In fact, his testimony established that it is his practice to search cell phones for text messages primarily

because DEA's policy allows for it and because it is common to find text messages that further the investigation.

The Court finds Agent Mitchell's statement that he searched the phone because of his concern that text messages might immanently expire is not credible. The Court finds by a preponderance of the evidence that the true, and only, purpose of the search by Agent Mitchell was to find incriminating evidence. A search of the electronic memory of a cell phone does not properly [\*13] fit within the scope of an inventory search or a search incident to an arrest. The DEA policy on rummaging through cell phones during the booking process cannot immunize an otherwise unconstitutional search. In addition, there were no exigent circumstances to justify a warrantless search. This finding is made based on the Government's own witness Agent Newsome, who stated that text messages will be retained in the memory of a cell phone until the user deletes them. With Wall in custody, that was no longer a danger. For these reasons, the Court suppressed the text messages obtained from Wall's cell phones.

Accordingly, after due consideration, it is

**ORDERED AND ADJUDGED** that Defendant Aaron Wall's First Particularized Motion To Suppress Evidence And Statements (DE 63) be and the same is hereby **GRANTED** in part and **DENIED** in part as follows:

1. The text messages obtained from Aaron Wall's cell phones and memorialized in Government Exhibits 12, 13, 14, 15, 16, 17, and 18 be and the same are hereby **SUPPRESSED**; and

2. In all other respects, the instant Motion be and the same is hereby **DENIED**.

**DONE AND ORDERED** in Chambers at Fort Lauderdale, Broward County, Florida, this 22nd day of December, [\*14] 2008.

/s/ William J. Zloch

WILLIAM J. ZLOCH

United States District Judge

## AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

### AMENDMENT IV

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 Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

# CONSTITUTION OF THE STATE OF OHIO

## ARTICLE I: BILL OF RIGHTS

### § 14 SEARCH AND SEIZURE

The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the person and things to be seized.