ORIGINAL

IN THE SUPREME COURT
OF OHIO

STATE OF OHIO,
Plaintiff-Appellee,

vs.

ANTWAUN SMITH,
Defendant-Appellant.

Supreme Court Case No. 2008-1781

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

Court of Appeals Case No. 07-CA-47

* * * *

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STATEMENT OF THE CASE

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

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

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

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

STATEMENT OF FACTS

On January 21, 2007, Detective Craig Polston of the Beavercreek Police Department (BPD), presently assigned to the Greene County Agencies for Combined Enforcement (ACE) Task Force received a call informing him that a large amount of crack cocaine was found in the residence of Wendy Northern at 3884 Timberline Drive in Beavercreek, Ohio. (TR. p. 99-100). Ms. Northern had been transported to Miami Valley Hospital as a result of a possible drug overdose. Detectives Polston and Scott Molnar (also from the BPD assigned to the ACE Task Force) responded to the hospital to interview Ms. Northern. (TR. p. 100-101). While at the hospital, Ms. Northern was asked about her main drug supplier and if she would cooperate with detectives and place phone calls to her supplier to set up a controlled buy. (TR. p. 101). Ms. Northern agreed to cooperate with detectives. (TR. p. 101). Ms. Northern told detectives that her drug supplier, to whom she referred as "Capo", had been riding as a passenger in a vehicle that had been stopped down the street from her home and was cited for possessing a small amount of marijuana. (TR p. 111-112). Detective Polston pulled the information from the traffic stop (including vehicle type, color, make and model) and subsequent arrest and learned the identity of the passenger to be Antwuan Smith. (TR p. 112). Detective Polston then showed a BMV photo of Antwuan Smith to Wendy Northern and she identified Mr. Smith, the Defendant to be her drug supplier a.k.a. "Capo". (TR p. 112).

After getting Ms. Northern some medication she needed, the detectives took her to the police station to get a written statement and to place some controlled phone calls. (TR p. 102-103). These phone calls were placed to a cell phone and were recorded. (TR

p. 103). Detective Polston asked Ms. Northern to request an ounce of crack cocaine (which equates to approximately 28 grams) from her supplier. (TR p. 107). During the phone conversation, the Defendant agreed to come to Ms. Northern's home to deliver an ounce of crack cocaine. (TR p. 291). The Defendant was originally supposed to be at Ms. Northern's home earlier, but did not show up until much later than expected due to transportation issues. (TR p. 294-295). While Ms. Northern was being transported to back to the Greene County jail, she received a call from the Defendant telling her that he was in her driveway. (TR p. 295). This information was immediately relayed to police officers.

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

ARGUMENT

PROPOSITION OF LAW NO. 1:

> ALLOWING A LIMITED SEARCH OF THE CALL LOG/CALLER ID, CONTACT INFORMATION/ ADDRESS BOOK, AND TEXT MESSAGES ON A CELL PHONE UNDER THE IMMEDIATE CONTROL OF A SUSPECT RECENTLY PLACED UNDER ARREST IS REASONABLE AND CONSISTENT WITH OTHER OHIO LAW.

It has been long recognized that a warrantless search of an individual who has been lawfully arrested can be conducted without a resulting violation of the Fourth Amendment. In *Chimel v. California,* the United States Supreme Court recognized that, in an effort to discover and preserve evidence and disarm a suspect before taking them in to custody, a government agent may conduct a search incident to arrest. *Chimel v. California* (1969), 395 U.S. 752. Pursuant to an officer's authority to conduct a search incident to arrest, police are authorized to conduct a full search of the suspect's person and the area within their immediate control. *Id.* A full search of the person, his effects, and the area within his immediate reach at the time of a lawful custodial arrest may be conducted without regard to any exigency or the seriousness of the offense, and regardless of any probability that the search will yield a weapon or evidence of the crime for which the person is arrested. *United States v. Robinson,* 414 U.S. 218, 236, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973). It has also been recognized that a search that could be conducted at the time of arrest may also be legally conducted later when the accused arrives at the location where he will be detained. *U.S. v. Edwards* (1974), 415 U.S. 800.

While the ability to search the contents of a cell phone incident to arrest is an issue of first impression in Ohio, it is well established that police may search a container

under the person's immediate control incident to that person's arrest. In *State v. Matthews* (1976), 46 Ohio St.2d 72, 346 N.E. 2d 151, this Court held that the warrantless search of a woman's purse, clutched under her arm and under her immediate control, incident to her lawful arrest is reasonable. It is hard to imagine that a cell phone, which can only contain data, is entitled to a greater protection than the contents of a purse or wallet.

The State submits that allowing law enforcement to search the caller ID log of a suspect's cell phone incident to his lawful arrest is also reasonable under *Chimel, Edwards, Robinson*, & *Matthews*, supra. In the instant case, the search of the Defendant's cell phone is limited and reasonable, and akin to the search for an identification card or a phone number contained in a purse or wallet. First, a search of a caller ID log to ensure that the suspect's cell phone contains the call log of calls placed to an informant's cell phone is limited in scope. This is not a case where the law enforcement officers were searching throughout Defendant's emails and other confidential data, and using that information as the basis for new investigation. Even if police did exceed the appropriate scope in searching a cell phone incident to arrest, there are evidentiary procedures to cure any abuse of discretion on the part of the officers.

Second, and more importantly, this evidence is helpful to police to ensure the identity of suspect, and that law enforcement has the right person. Ensuring that the police arrest the right person is obviously one of the major goals of our justice system. If in the instant case the Defendant's cell phone call log was searched, and the informant's information was not in Defendant's phone, then that evidence would be preserved as exculpatory evidence for the Defendant. Thus, allowing a limited search of

a cell phone incident to arrest is sound public policy and reasonably tailored to fulfill a legitimate State interest. Therefore, the Second District properly upheld the search of the cell phone as reasonable.

In the appellate court, Defendant erroneously relied upon *State v. Martinez*, Shelby County App. No. 13-04-49, 2006 Ohio 2002. In that case, the Defendant's vehicle was stopped by an officer at the behest of another officer. The requesting officer did not have reasonable suspicion the stop the vehicle, and the subsequent search of the Defendant's cell phone by the stopping officer was unsupported by probable cause. It should be noted, however, that the Third District Court of Appeals case did determine the Defendant's cell phone was a container, and the contents of the container was the information that it contained. *Id.* at ¶11. The Third District also noted that even though the search of the cell phone and the introduction of the evidence obtained therefrom was improper, the burden is still on a defendant to show that the improper evidence is prejudicial in order to reverse a conviction. *Id.* at ¶12.

In the instant case, the State submits as an initial matter, that even if this Court finds that the search of the cell phone is improper, the Defendant cannot show, based upon the overwhelming evidence of guilt, that he is prejudiced by the introduction of the photographs showing the caller identification (caller ID) of the informant's cell phone on the Defendant's phone. The testimony of the informant, Wendy Northern, established that she knew the Defendant, she arranged to buy drugs from the Defendant, and she was able to identify the Defendant. The officers also testified that the Defendant was present at the scene, and in close proximity to the drugs that were found, which corroborates the testimony of Northern. Thus, the introduction of the evidence

obtained from the cell phone is merely corroborative, and is hardly prejudicial in light of the other testimony presented.

1. A CELL PHONE WHICH STORES INFORMATION IS A CONTAINER

Nevertheless, the search of the Defendant's cell phone incident to his arrest was proper because a cell phone is a container and is warranted under exigent circumstances. The Defendant puts great weight on the dissent's opinion below that a modern cell phone is unlike any other item normally transported in a person on a regular basis, due to its capacities for storing vast amounts of information. The State submits that this position is inaccurate and improper for two reasons. First, the phone at issue here is not a smart phone (i.e. Blackberry, iphone, Palm, etc.). It is a fairly basic cell phone by today's standards and the scope of the search was properly limited in scope to the caller ID log. The information accessed incident to arrest was not password protected. There was no hacking into corporate business records as envisioned by the dissent. Secondly, the search at issue here is nothing more than looking through an address book that one would keep in their purse or wallet. The only difference is that the information is stored electronically, and not on paper.

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

crime. The ACE Task Force had recorded phone calls the Defendant made to the informant; the call records in the cell phone would provide additional proof that the Defendant in fact made the phone calls the Task Force had recorded.

The Defendant cites *United States v. Chadwick* (1977), 433 U.S. 1, 97 S.Ct. 2476 for the proposition that the search of the cell phone was improper because it was conducted after the arrest at the police station, however *Chadwick* is easily distinguished from a cell phone. The evidence in *Chadwick* was a double-locked footlocker, which was not endanger of any evidence inside being altered or destroyed. As discussed below, cell phones can only contain a finite amount of information and thus, a search of a phone is necessary to prevent the destruction of evidence. In the case at bar, Detective Polston's testimony is not entirely clear at the motion to suppress whether the cell phone was first searched on scene or when the detectives returned to the police station. However, it has long been recognized that a search which could legally take place at the scene could also legally take place at a later time. See *Edwards*, supra. Further, the information obtained by officers was not password protected, nor was the cell phone "locked," thereby manifesting additional expectation of privacy. Because the Defendant was the subject of a valid arrest, the police were not required to get a warrant to search his person, and any containers found therein, incident to his arrest. Therefore, the search of the cell phone was legally valid.

Indeed, the overwhelming majority of federal courts deciding the issue have held a defendant's cell phone may properly be searched incident to arrest. In *U.S. v. Finley*, the Defendant drove a drug dealer to the location of a controlled buy for methamphetamine. *United States v. Finley*, 477 F.3d 250 (5th Cir. 2007), *cert. denied*,

127 S. Ct. 2065. After the sale was completed and the Defendant drove away, his vehicle was stopped. The Defendant and the drug dealer were ultimately arrested at the scene of the traffic stop, and the Defendant's cell phone was searched incident to his arrest. The Defendant's cell phone was searched later at the location of his detention, and revealed text messages discussing narcotics use and trafficking. The Defendant's call records were also searched at this time. The 5th Circuit Court of Appeals held that the search of the Defendant's cell phone was a valid search of a container incident to arrest, and the delay between the arrest and the search did not invalidate the search, pursuant to *Edwards, supra*. The *Finley* court further noted that 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. *Finley*, 477 F.3d at 259-260. Accordingly, allowing law enforcement to conduct a limited search of a cell phone's caller ID, contact information, and text messages, incident to arrest to look for evidence of the crime, is reasonably under the Fourth Amendment.

Similarly, in *United States v. Wurie*, 2009 WL 1176946/2009 U.S. Dist. Lexis 37434 (D. Mass. 5/4/2009), the District Court held that, as a matter of first impression, the search of a defendant's cell phone incident to his arrest is reasonable where the arrest is lawful and the search is conducted to preserve evidence and seize contraband. In *Wurie*, law enforcement arrested the defendant for distributing cocaine. In the course of his arrest, officers seized two cell phones from his person. The officers observed numerous calls logged on the caller ID screen from "my house". The officers observed the phone number attributed to "my house" and ran the number through

anywho.com to see if they could obtain an address. The officers did not access any other stored information. The *Wurie* court held, after conducting a thorough review of other federal cases addressing the search of a cell phone, that the search of the caller ID was limited and reasonable, because the officers reasonable believed that the stored telephone number would lead them to the location of the defendant's suspected drug stash.

While there is no decision on the issue from either the Ohio District Courts or the Sixth Circuit Court of Appeals, it is important to note that both Tennessee and Kentucky District Courts have upheld searches of cell phones. In *United States v. Ajan*, 2009 WL 1421183 (E.D.Tenn.), the District Court adopted the reasoning of the Fifth Circuit in *Finley*, supra. *Id.* at *10. In *United States v. Dennis*, 2007 WL 3400500 (E.D.Ky.), the District Court, also adopted the holding in *Finley* and held that the information retrieved from the cell phone was acquired from a valid search incident to arrest, and should not be suppressed. *Id.* at *7.

2. THE SEARCH OF THE CELL PHONE IS JUSTIFIED TO PREVENT THE DESTRUCTION OF EVIDENCE.

Further, even if this Court finds that the cell phone is not the equivalent of a closed container, the police were entitled to search based upon exigent circumstances to prevent the destruction of evidence. It is common knowledge that a cell phone's caller ID only holds a finite number of calls in its memory. Unlike a personal computer's hard drive, where deleted information can typically be recovered by experts, cell phone memory capabilities are much different, and once an item is deleted it is gone forever.

More troubling for the preservation of evidence is the technology that permits cell phone subscribers to remotely access their cell phone information over the internet and delete messages and information contained on the phone. Further, officers could not control the number of calls the Defendant's phone would receive between arrest and the time it took to obtain a warrant. It is further established that this Defendant conducted his trafficking with the witness over his cell phone. It is likely then that he conducted his business with other people in a similar fashion. Therefore, the police needed to search the phone and demonstrate the control call on the phone before it was deleted by further incoming calls.

Likewise, in *United States v. Valdez*, 2008 WL 360548 (E. D. Wisc. 2/8/2008), the District Court upheld a limited, warrantless search of a cell phone's address book and call history, incident to arrest, in order to preserve the destruction of evidence. The *Valdez* court reasoned that the search of a cell phone's address book and call history is very much like the search of a pager. *Id.* at *2. The *Valdez* court applied the reasoning of the 7th Circuit Court of Appeals, which held in examining a warrantless search of a pager, that "[a]n officer's need to preserve evidence is an important law enforcement component of the rationale for permitting a search of a suspect incident to a valid arrest. 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. Thus, it is imperative that law enforcement officers have the authority to immediately "search" or retrieve, incident to a valid arrest, information from a pager in order to prevent its destruction as evidence." *United States v. Ortiz,* 84 F.3d 977, 984 (7th Cir. 1996). In so

holding, the *Valdez* court rejected the argument that the evidence obtained from the phone should be suppressed under *United States v. Park,* No. CR 05-375, 2007 WL 1521573 (N.D. Cal. 5/23/07), because the search was limited in nature and in scope and done to preserve evidence that could be lost by incoming calls.

The *Valdez* court also noted that the United State's Supreme Court has held that there is no legitimate expectation of privacy in phone numbers one dials. "We doubt that people in general entertain any actual expectation of privacy in the numbers they dial. All telephone users realize that they must 'convey' phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed. All subscribers realize, moreover, that the phone company has facilities for making permanent records of the numbers they dial, for they see a list of their long-distance (toll) calls on their monthly bills." *Smith v. Maryland*, 442 U.S. 735, 742, 99 S. Ct. 2577, 2581.

The State submits that the logic of the United States Supreme Court in *Smith v. Maryland*, supra, is instructive as applied to the case at bar in crafting a reasonable and narrowly tailored law which allows for the preservation of evidence by law enforcement and protects the privacy interests of individuals. Under *Smith v. Maryland,* there is no expectation of privacy in phone numbers dialed because they are necessarily transmitted to the phone company, and are meaningless without that transfer. Thus, it is clear that a suspect's privacy interest is not violated in the search of a call log or caller id. Further, when looking to the preservation of evidence, cell phone capabilities for storage are different than that of a personal computer, and cell phone memory is finite, so permitting the limited retrieval of contact information and text messages in searching

for additional evidence of a crime incident to arrest is reasonable. This approach alleviates any fears of the dissent below, by keeping law enforcement's search limited and reasonable, while still protecting the privacy interest of an individual.

CONCLUSION

The Defendant in this case was the subject of a valid arrest. Therefore, police were not required to get a warrant to search his person, and any containers found therein, incident to his arrest. The Defendant had a cell phone on his person which is analogous to a closed container. Incident to his arrest, police officers were able to conduct a limited search of the cell phone's caller ID without a warrant to look for evidence of the informant's calls on the Defendant's cell phone. Moreover, a cell phone only stores a finite number of calls in its memory, and thus, the search was reasonable to preserve evidence. Therefore, the trial court did not err in not suppressing the contents of the cell phone.

For the foregoing reasons, the State respectfully requests this Court affirm the decision of both the trial court and appellate court below.

Respectfully Submitted,

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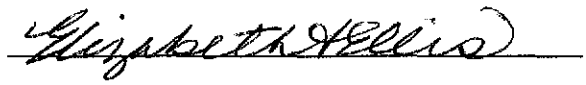
CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been sent to Craig M. Jaquith, Assistant State Public Defender, 250 E. Broad Street, Suite 1400, Columbus, Ohio 43215, Jeffey Gamso, 4506 Chester Avenue, Cleveland, Ohio 44103, and Kathleen M. Tatarsky, 110 Central Plaza South, Suite 510, Canton, Ohio 44702-1413 via regular U.S. mail, the date the same was faxed to the Clerk.