



Broward County Chiefs of Police Association, Inc.

Legal Update

Legal Advisor Committee

Joel Cantor
Capt. Mike Martinez
954-967-4490

May 5, 2011

DOES THE SEARCH OF A CELLULAR PHONE REQUIRE A WARRANT ?

The 1st District Court of Appeal issued a ruling last week regarding the lawfulness of gathering evidence from a subject's cellular phone incident to his arrest. Law enforcement are continually confronted with this dilemma following the arrest of a subject and the seizure of the subject's cellular phone. While in law enforcement custody, the suspect's cellular phone projects images or relays detailed messages that may be related to the crime that the subject was arrested for. In issuing its ruling, the 1st District Court of Appeal relied on a significant amount of federal case law relating to searches incident to lawful arrest. As we would expect, this matter may end up before the Florida Supreme Court as a matter of great importance.

Smallwood was in possession of his cellular phone at the time of his arrest for armed robbery. Although at the time of arrest, the arresting Officer had no distinct belief that Smallwood's phone contained evidence related to the robbery, the Officer eventually testified that he looked at the stored images on the phone to see "if Smallwood took any pictures relating to the crime" because the Officer "knew some people do that". The evidence revealed that Smallwood's phone did contain images of the stolen money, a firearm used in the armed robbery and other pictures which were admitted at trial which resulted in Smallwood's conviction. Smallwood appealed, arguing that the search of cellular phone without a warrant constituted a 4th Amendment illegal search.

The 1st DCA found that this case was controlled by the precedent of several United States Supreme Court cases including U.S. vs. Robinson, which held that "containers" discovered in the possession of a person incident to their arrest may be searched without any additional justification. The 1st DCA further relied upon the U.S. vs. Finley decision, which ruled that it was lawful for law enforcement to seize a suspect's cellular phone and read his text messages following his arrest in a drug buy, declaring that the phone was essentially a "container" discovered in the possession of the suspect. The 1st DCA also referenced similar federal cases in support of the search of the phone seized from the body of a suspect incident to a lawful arrest.

Acknowledging the unique technology of a modern day cellular phone which can store personal data, the 1st DCA upheld law enforcement's search of Smallwood's phone and the submission of images displayed by Smallwood's phone at trial. This Court carefully distinguished as a basis in its ruling that the phone was seized from the personal possession of Smallwood. This Court further articulated that since there was no reason to believe that the phone contained evidence of the robbery, the search of the phone may well have been unlawful if it has been seized somewhere else other than from Smallwood's person. The issues argued in this case have been certified to the Florida Supreme Court, so we may not have seen the last of this case on appellate review.

RELIABILITY OF A DRUG-DETECTION DOG ALERT

The issue of when a drug-detection dog's alert provides probable cause for a subsequent search was recently before the Florida Supreme Court in the case of Harris vs. State. On June 24, 2006, a Sheriff's Office Canine Officer and his drug-detection dog were on patrol. The Canine Officer conducted a traffic stop upon Harris' truck after confirming the truck tag was expired. Upon approaching Harris' truck, the Officer noticed that Harris was nervous, shaking and could not sit still. The Officer asked for consent to search the truck and Harris refused. The Officer deployed his drug detection canine and the dog examined the exterior of Harris' truck, alerting to the door handle of the driver's side. As a result of the positive alert, the Canine Officer discovered over 200 pseudoephedrine pills in a bag wrapped in a shirt. On the passenger side, the canine Officer discovered several boxes of matches containing a total of 8000 matches. Harris was placed under arrest and a subsequent search of the truck toolbox revealed muriatic acid which the Officer testified are precursor chemicals to methamphetamine. Post-miranda Harris advised he had been "cooking meth for about one year" and most recently cooked it 2 weeks prior to the traffic stop. Harris also admitted to being a meth addict.

On the day of the search of Harris' truck, the Canine Officer had been a law enforcement Officer for 3 years and a canine handler for 2 of those years. The drug-detection canine had completed a 120 hour drug-detection training course and was certified as a drug detection dog, trained and certified to detect cannabis, cocaine, ecstasy, heroine and methamphetamine. The dog was not trained to detect alcohol or pseudoephedrine. Although the canine Officer testified that pseudoephedrine is a precursor of meth, there was no testimony whether a dog trained to detect and alert to meth would also detect and alert to pseudoephedrine.

The issue of when a dog's alert provides probable cause for an alert hinges on the dog's reliability as a detector of illegal narcotics within a vehicle. The Florida Supreme Court ruled in this case that the State may establish probable cause by demonstrating that the Officer had a reasonable basis for believing the dog to be reliable based on the totality of circumstances. Because of the inability to cross-examine a dog, like any other witness whose observations may provide the basis for probable cause to search a vehicle, the State must introduce evidence concerning the dog's reliability. In this case, the Supreme Court specifically addressed what evidence the State must introduce in order to establish the reasonableness of the Officer's belief. In layman's terms, what evidence must be introduced in order for a trial court to undertake an objective evaluation of the Officer's belief in the dog's reliability when seeking probable cause?

The Florida Supreme Court ruled in this case that the reliability of a dog as a detector of narcotics substances is subject to a totality of circumstances analysis. Therefore, a trial court must be presented with evidence as to a drug-detection dog's reliability. Evidence that the dog has been trained and certified to detect narcotics, by itself, is no longer sufficient to establish the dog's reliability for purposes of determining probable cause, especially since the Court observed that the training and certification for drug detection dogs are not standardized, and thus, each training and certification program may differ.

The Supreme Court concluded that to meet its burden of establishing that the Canine Officer had a reasonable basis for believing his dog to be reliable in order to establish probable cause, the State must present training and certification records, an explanation of the meaning of the particular training and certification of that dog, field performance records and evidence concerning the experience and training of the Officer handling the dog as well as any other objective evidence known to the Canine Officer about the dog's reliability regarding the detection of illegal substances inside a vehicle. The trial court must then assess the reliability of the dog's alert as a basis for probable cause to search a vehicle based on the totality of circumstances.

The Supreme Court ruled that the State failed to meet its burden of establishing probable cause. In the absence of a court-recognized reliable alert, the other factors considered in the totality of circumstances analysis including Harris' expired tag, nervousness, shaking, inability to sit still and an open beer can on the truck floorboard did not rise to the level of probable cause that there were illegal drugs inside the vehicle. Accordingly, the court determined that search of Harris' vehicle violated the 4th Amendment.