

CELL PHONES: SEARCH AND SEIZURE

Analyzing a Case

Introduction

The Supreme Court of Ohio in December 2009 ruled that the U.S. Constitution's Fourth Amendment prohibition against unreasonable searches and seizures requires police to obtain a warrant to search a cell phone. The decision generated considerable comment across the country, as this was the first such ruling from a state supreme court.

This lesson plan provides teachers and students with the tools to study, consider and discuss a contemporary case focusing on the Fourth Amendment. The exercise is designed for middle and high school students who likely will appreciate the details of the case involving cell phones and privacy. It includes:

- Wording of the Fourth Amendment and related terms
- Basics of search warrants
- Background information about the case
- A link to the video stream of the oral arguments before the Court
- A summary of the legal issues and the Court's decision.

Alignment

The exercise aligns with the following content standards in the high school American Government syllabus standards recently adopted by the State Board of Education: CS 1, CS 3, CS 4, CS 6, CS 9, CS 11, CS 12.

Moving Ahead

The flexible format offers a variety of options for study and class discussions. For example, teachers may choose to have students watch the video stream of the oral arguments as homework and discuss the case in class (the video runs about 34 minutes). Or teachers may want to view and discuss the case during one class period or over the course of two periods.

- Ask the students to review the Fourth Amendment and identify the two distinct clauses. (NOTE: The first prohibits unreasonable searches of persons and property. The second clause defines what constitutes a proper warrant.) Ask the students what they consider unreasonable searches and reasonable and/or unreasonable conditions for a warrant.
- Ask the students to read the case summary on “Handout 3 — Overview: *State v. Smith*.” What are their first impressions of the details? What should they look for from the attorneys who argue the case?



THE FOURTH AMENDMENT

“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.”

With the passage of the Bill of Rights in 1791 (Amendments I-X of the U.S. Constitution), Americans enjoyed freedom and rights, including protection against unreasonable searches and seizures by government officials. The understanding and interpretation of ideas expressed in the Fourth Amendment have been influenced by historical events, technological inventions and changes in thinking about the meaning of the provisions in the amendment.

Additional Terms

The following terms are used throughout *State v. Smith* oral arguments.

Bright-Line Rule — A legal rule or decision that tends to resolve issues, especially ambiguities, in a straightforward manner.

Closed Container — In making an arrest, the police may search a person, the immediate area and some containers in the individual’s possession. A cigarette package containing drugs is an oft-cited example of the closed container. The U.S. Supreme Court has defined a container as “any object capable of holding another object.”

Exigent Circumstance — A situation in which a police officer must take immediate action to effectively make an arrest, search or seizure for which probable cause exists, without first obtaining a warrant. See “Handout 2 — Basics of Search Warrants” for more information.

Harmless Error — An erroneous ruling by a judge at trial that is not serious enough to affect the outcome of the case.



BASICS OF SEARCH WARRANTS

1. Each search warrant allows the search of only one person, place or vehicle. But more than one warrant can be issued at one time, allowing a person, place and vehicle all to be searched at once, or soon thereafter.
2. The warrant must identify the exact area to be searched.
3. The warrant must state what type of property is being searched.
4. The police officer must swear under oath that the information given is true.
5. The warrant must be issued by a neutral and properly authorized judge or magistrate.
6. The person issuing the warrant must believe there is probable cause.
 - *Probable cause to search* — evidence that leads a reasonable person to believe that it is more likely than not that if a specific place is searched, specific criminal goods will be found.
 - *Probable cause to arrest* — evidence that leads a reasonable person to believe that it is more likely than not that a crime was committed and the person to be arrested is the one who committed the crime.

Exceptions to The Search Warrant and/or Probable Cause Requirements

- A. Search incident to a lawful arrest — The police can search a person and his immediate surrounding area for hidden weapons or evidence that could be destroyed (probable cause is not needed).
- B. Automobile searches — Reasonable if the police officer has probable cause to believe there is contraband in the car.
- C. Voluntary consent — If a person agrees, the police can conduct a search without a search warrant or probable cause.
- D. Hot pursuit — If police are in hot pursuit of a suspect, they do not have to get a search warrant to enter a building they saw the suspect enter. The police also can seize evidence they find while in pursuit of a felon.
- E. Emergency situations — Sometimes police do not have time to get a warrant because of an emergency situation, like a bomb scare, a person's life is in danger, or some other urgent situation.
- F. Border and airport searches — Custom agents may search without probable cause or a warrant.

The courts also allow police to conduct a “stop and frisk” without a warrant if a police officer reasonably thinks a person is behaving suspiciously and may be armed. The frisk only can be for weapons that could harm the police or a third person. If the police want to search more, a search warrant is required.



OVERVIEW: *STATE V. SMITH*

Antwaun Smith was arrested on drug-related charges after responding to a call to his cell phone placed by a crack cocaine user acting as a police informant. During the arrest, police searched Smith and found a cell phone on his person. The arresting officer put the cell phone in his pocket, placed Smith in a cruiser and then searched the scene for evidence. Police later recovered bags containing crack cocaine at the scene. Officers subsequently searched the contents of Smith's phone without a search warrant or his consent. They discovered call records and stored numbers that confirmed prior calls between Smith's phone and the informant's phone number. Smith was charged with possession of cocaine, trafficking in cocaine, tampering with evidence and two counts of possession of criminal tools.

During pretrial proceedings, Smith moved to suppress all evidence police obtained through the search of his cell phone, arguing that in conducting that search without first obtaining a warrant, the officers violated his constitutional right against unreasonable search and seizure. The trial court ruled that it would not allow the state to use photographs taken from Smith's cell phone, but denied the motion to suppress as it related to call records and stored numbers discovered on Smith's phone, citing a 2007 federal court decision, *United States v. Finley*, which held that a cell phone is similar to a closed container found on an arrestee's person and, therefore, is subject to search by an arresting officer without a warrant. Smith was convicted on all counts and sentenced to 12 years in prison.

He appealed his convictions and sentence, asserting among other claims that the trial court erred in denying his motion to suppress evidence obtained through the warrantless phone search. In a 2-1 decision, the 2nd District Court of Appeals affirmed the action of the trial court. The dissenting member of the three-judge panel cited a different federal court's decision, *United States v. Park*, which held that a cell phone is not a "container" as that term is used in prior Fourth Amendment cases, and that a warrantless police search of data stored in a defendant's cell phone was unconstitutional.

Smith sought and was granted Supreme Court of Ohio review of the 2nd District's ruling with regard to the constitutionality of the phone search. The case was argued before the Supreme Court on Sept. 15, 2009.



THE ORAL ARGUMENT

- View oral argument video of this case.
- Web address:
<http://www.supremecourtofohiomedialibrary.org/Media.aspx?fileId=122113>

Suggested Viewing/Discussion Options

At the completion of Craig Jaquith's presentation on behalf of Antwaun Smith, ask the students to summarize his key points and to comment on the strengths and weaknesses. Do the same for Stephen Haller, attorney for the state and Greene County prosecutor's office.



THE DECISION

Warrantless Search of Cell Phone Data Barred Unless Necessary for Officer's Safety or to Preserve Evidence

The Supreme Court of Ohio ruled that the Fourth Amendment prohibition against unreasonable searches and seizures requires police to obtain a warrant before searching data stored in a cell phone that has been seized from its owner in the course of a lawful arrest when the search is not necessary to protect the safety of law enforcement officers and there are no exigent circumstances.

The Court's 4-3 majority decision, which reversed a ruling of the 2nd District Court of Appeals, was authored by Justice Judith Ann Lanzinger.

In the decision, Justice Lanzinger wrote: "Smith bases his challenge on the Fourth Amendment to the United States Constitution, which provides protection against unreasonable searches and seizures. It is well established that searches conducted without a warrant are per se unreasonable, subject to certain 'jealously and carefully drawn' exceptions.' *Jones v. United States* (1958). ... The exception that the state relies on is the search incident to arrest, which allows officers to conduct a search that includes an arrestee's person and the area within the arrestee's immediate control. ... This exception 'derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations.' *Arizona v. Gant* (2009). ... But when the interests in officer safety and evidence preservation are minimized, the court has held that this exception no longer applies."

Noting that neither the U.S. Supreme Court nor any other state supreme court appears to have ruled on the Fourth Amendment implications of a cell phone search, Justice Lanzinger said the two leading cases on that issue appear to be the conflicting federal court decisions cited in the 2nd District's majority and dissenting opinions.

She wrote: "In *United States v. Finley* ...the Fifth Circuit upheld the district court's denial of defendant's motion to suppress call records and text messages retrieved from his cell phone. ... Finley was arrested during a traffic stop after a passenger in his van sold methamphetamine to an informant. During the search incident to the arrest police found a cell phone in Finley's pocket. He was taken along with his passenger to the passenger's house, where other officers were conducting a search. While Finley was being questioned there, officers examined the cell phone's call records and text messages, finding evidence that appeared to be related to narcotics use and drug trafficking. ... In upholding the search, the Fifth Circuit analogized Finley's cell phone to a closed container found on an arrestee's person, which may be searched. ... Notably, Finley had conceded that a cell phone was analogous to a closed container. ... Because Smith does not concede here that a cell phone is analogous to a closed container, the analysis in *Finley* is not entirely applicable." In other words, the legal argument presented by Finley addressed the legitimacy of the search itself and not whether a cell phone meets the criteria of a closed container.



THE DECISION – CONTINUED

“The United States District Court for the Northern District of California, disagreeing with the Fifth Circuit’s decision in *Finley*, granted a defendant’s motion to suppress the warrantless search of his cell phone. *United States v. Park* (N.D.Cal., May 23, 2007). Police officers observed Park entering and leaving a building that they had under surveillance and for which they had obtained a search warrant. When they executed the warrant and searched the building, they found evidence of an indoor marijuana-cultivation operation. They arrested Park and took him to booking, where they searched him and found a cell phone. Before turning over the cell phone to the booking officer, the arresting officer recorded names and phone numbers found in Park’s cell phone. ... Because the search of the cell phone’s contents was not conducted out of concern for the officer’s safety or to preserve evidence, the court found that it did not fall under the search-incident-to-arrest exception and that the officers should have obtained a warrant to conduct the search.”

In this case, Justice Lanzinger wrote, “The state argues that we should follow *Finley* and affirm the court of appeals because the trial court was correct in its conclusion that a cell phone is akin to a closed container and is thus subject to search upon a lawful arrest. We do not agree with this comparison, which ignores the unique nature of cell phones. Objects falling under the banner of ‘closed container’ have traditionally been physical objects capable of holding other physical objects. Indeed, the United States Supreme Court has stated that in this situation, ‘container’ means ‘any object capable of holding another object.’ *New York v. Belton* (1981).”

While acknowledging several federal court decisions during the 1990s that treated electronic pagers and computer memo books as closed containers for search and seizure purposes, Justice Lanzinger wrote: “Each of these cases, however, fails to consider the Supreme Court’s definition of ‘container’ in *Belton*, which implies that the container must actually have a physical object within it. Additionally, the pagers and computer memo books of the early and mid-1990s bear little resemblance to the cell phones of today. Even the more basic models of modern cell phones are capable of storing a wealth of digitized information wholly unlike any physical object found within a closed container. We thus hold that a cell phone is not a closed container for purposes of a Fourth Amendment analysis.

“Although cell phones cannot be equated with laptop computers, their ability to store large amounts of private data gives their users a reasonable and justifiable expectation of a higher level of privacy in the information they contain,” wrote Justice Lanzinger. “Once the cell phone is in police custody, the state has satisfied its immediate interest in collecting and preserving evidence and can take preventive steps to ensure that the data found on the phone is neither lost nor erased. But because a person has a high expectation of privacy in a cell phone’s contents, police must then obtain a warrant before intruding into the phone’s contents.

“... We hold that the warrantless search of data within a cell phone seized incident to a lawful arrest is prohibited by the Fourth Amendment when the search is unnecessary for the safety of law-enforcement officers and there are no exigent circumstances. Because the state failed to show that either of these exceptions to the warrant requirement applied, the search of Smith’s cell phone was improper and the trial court was required to exclude from evidence the call records and phone numbers taken from the cell phone. We accordingly reverse the judgment of the court of appeals and remand to the trial court for proceedings consistent with this opinion.”



THE VOTE

Justice Lanzinger's opinion was joined by Chief Justice Thomas J. Moyer and Justices Paul E. Pfeifer and Maureen O'Connor.

Dissenting Opinion

Justice Robert R. Cupp entered a dissenting opinion, joined by Justices Evelyn Lundberg Stratton and Terrence O'Donnell, stating that in his view the majority erred by "needlessly theorizing" about cell phone capabilities in the abstract rather than following *Finley* and similar decisions which held that police may conduct warrantless searches of closed containers found on the person of an arrestee. He wrote: "As the majority opinion recognizes, a cell phone's digital address book is akin to traditional address books carried on the person. Courts have upheld police officers' search of an address book found on an arrestee's person during a search incident to a lawful arrest. ... The phone's call list is similar, showing a list of telephone numbers that called to or were called from the phone.

"Thus, I would hold that the search here — which resembles police officers' search of a traditional address book found on the person of an arrestee during a search incident to arrest — is permissible under the Fourth Amendment.

"The majority bases its broad holdings on its estimation of the possible capabilities of other cell phones and computers. But here only the address book and call records were admitted into evidence. The issue of a more in-depth warrantless search of 'data within a cell phone' is not before us. I would leave for another day, to a case that factually raises the issue directly, the question of whether police may perform more in-depth searches of information on cell phones that have capabilities akin to a computer."

Current Status

The Supreme Court of the United States did not accept the appeal of the State of Ohio to review the case.

The Supreme Court of Ohio decision vacated (put aside) the criminal conviction of Antwaun Smith. He was to stand trial on the charges of Trafficking in Cocaine, a 1st Degree Felony, with mandatory imprisonment; Possession of Cocaine, 1st Degree Felony; and Tampering with Evidence, 3rd Degree Felony. The Ohio Public Defender's office and the Greene County Prosecutor's office reached an agreement in which Smith pleaded guilty to the charges of trafficking and tampering with evidence. His original sentence was reduced from 12 years to seven years in prison. Smith has served four years and will be released in 2014.

Meanwhile, in a separate case the Supreme Court of California in a 5-2 decision issued January 2011 held the police do not need a warrant to search cell phones of individuals who are arrested. The court said defendants lose their right to privacy for items they are carrying when taken into custody. To read the decision visit: www.courtinfo.ca.gov/opinions/documents/S166600.PDF



DISCUSSION POINTS

- Ask the students to summarize and comment on the questions from the Justices during the arguments. Would they have asked different questions? Ask the students how they would rule and why.
- Were the students surprised by the court's holding (decision)? Did they agree or disagree? And what was the reaction to the dissent?
- Review "Handout 2 — Basics of Search Warrants." Ask students to draft a warrant for Antwaun Smith's cell phone that was found by officers upon his arrest.
- Invite a criminal defense attorney, representative from the prosecutor's office and police officer to discuss the issues raised in the case (you may be surprised that attorneys will eagerly accept your invitation, if their schedule permits). In addition to the Smith case, you may ask the panel to address other cases in which the Fourth Amendment played a critical role.
- The full case file is available on the Supreme Court of Ohio case docket at: www.supremecourt.ohio.gov/Clerk/ecms. Search for case no. 2008-1781.

FEEDBACK

Click [here](#) to complete a brief survey about the "Extra Credit" activity.

