



# DPS Legal Review

January 2015 Legal Services (404) 624-7423 Volume 14 No. 1

## CELLPHONE SEARCH INCIDENT TO ARREST

On December 30, 2012, at 2:00 a.m., the defendant drove his vehicle into the path of oncoming traffic and forced an unmarked police car off the road. The officer stopped the defendant's vehicle and began a DUI investigation. During his questioning of the defendant, he observed that the defendant smelled of alcohol, had slurred speech, and had bloodshot, glassy eyes. The defendant admitted that he had recently been drinking alcohol. A second officer arrived at the scene of the traffic stop to assist. The first officer arrested the defendant for DUI and placed him in the back of the patrol car.

The second officer sat in the front seat of the patrol car. The defendant's cell phone, which was in the front seat with the officer, rang several times. The defendant asked the officer to answer the phone and speak to his father. Each time the phone rang the officer muted the phone. The final time the phone rang the officer muted it and opened the pictures application. The officer looked through the phone "to see if there was any evidence to substantiate the stop or [show the [defendant]] previously drinking before the stop." The officer looked through ten to twelve pictures stored on the phone. The officer observed pictures that appeared to be child pornography. The officer provided information about the pictures to a detective. The detective obtained a search warrant to look for evidence of sexual exploitation of a child on the defendant's phone. The search warrant was executed and additional incriminating images and messages were found.

The defendant was charged with driving under the influence of alcohol to the extent that it was less safe to drive; driving under the influence of alcohol while having an alcohol concentration of 0.08 grams or more; and twelve counts of possessing a lewd depiction of a minor child in violation of O.C.G.A. §16-12-100(b)(8). The defendant filed a motion to suppress the evidence contending that the warrantless search of the digital contents of his cell phone violated his Fourth Amendment right to be free from unlawful searches. The trial court denied the motion. The defendant appealed.

**HOLDING:** The Court held that the warrantless search of the defendant's cellphone was unconstitutional. The Court relied on the U.S. Supreme Court's decision in Riley v. California, in

which the Court held that, under the Fourth Amendment, the police generally may not, without a warrant, search digital information on a cell phone seized from an individual who has been arrested as incident to arrest. However, the Supreme Court's ruling did not make information on a cell phone immune from search as there may be situations in which exigent circumstances may still justify a warrantless search of a particular phone. Such exigencies could include the need to prevent the imminent destruction of evidence, to pursue a fleeing suspect, and to assist persons who are seriously injured or are threatened with imminent injury. A court would be required to examine whether an emergency justified a warrantless search in each particular case.

In this case, the State failed to show the second officer had an immediate necessity to search the defendant's cell phone and no opportunity to obtain a warrant. The Court also held that the evidence seized from the defendant's cell phone pursuant to the search warrant was also suppressed since the search warrant was based on information derived from the previous illegal search.

The State argued that the warrantless search in this case occurred prior to the Riley decision and that the Court's decision should be based on the law prior to that decision. The Court reasoned that under the controlling law at the time of the search, Hawkins v. State, the search was still illegal. Hawkins held that when a driver is arrested, the driver's cell phone may be treated in the same manner as a traditional physical container. The scope of the search must be limited as much as is reasonably practicable by the object of the search. On these facts, the officer did not have specific knowledge of the defendant's use of his cell phone; the officer did not text with the defendant prior to the stop; he did not see the defendant enter any data into the phone; and did not have any particularized reason to believe the defendant used his phone to take pictures that would corroborate the DUI arrest. Brown v. State, 2014 WL 7130535 (Ga.App.).

## PROVOCATION FOR FLIGHT

On April 21, 2014 at 4:36 p.m., the defendant and three other black men were standing in a public common area of the Windsor Cove Apartments in Orlando, Florida. Five uniformed officers were on proactive patrol due to high drug and criminal activity in the area. A taxi van approached the men and five uniformed officers “quickly exited the vehicle and approached the group.” Upon exiting their vehicle, the officers had their hands “in a neutral position” and they did not give any verbal commands. The defendant began to “run through the complex” and the officers pursued him. The officers fired a Taser gun at the defendant and repeatedly ordered him to stop running. The officer tackled the defendant in a watery canal, subdued him with physical force, handcuffed him, and removed him from the canal. A marked police car approached and the officers asked the defendant questions as they searched him by the police car. The defendant told the officers he had a gun. The officers located the gun in a pocket of a pair of shorts that the defendant had on under his jeans. The officers also found a plastic bag containing .5 grams of cannabis in the defendant’s jeans. The defendant was transported to jail where the officers read him his *Miranda* warnings.

The defendant was charged with being a felon in possession of a firearm. The defendant filed a motion to suppress the evidence contending that the firearm and his incriminating statements to the officers after his arrest are inadmissible. The defendant argued the evidence was inadmissible because the officer seized the firearm after detaining the defendant without reasonable suspicion, probable cause, or a warrant and that the defendant’s statement concerning the firearm occurred during a custodial interrogation that was not preceded by *Miranda* warnings.

**HOLDING:** The Court denied the defendant’s motion to suppress the evidence. The Court relied on Supreme Court precedent case law that held that flight from approaching officers in a high crime area are facts “sufficient to establish reasonable suspicion” so long as the flight was not improperly *provoked* by the officers.” Improper provocation is conduct that would cause a reasonable and innocent person to flee. The Court found the defendant’s flight from the officers was not improperly provoked by the officers’ actions. United States v. Lockett, 2015 WL 164584 (M.D.Fla.).

## RECENT FEDERAL ORDER

On January 16, 2015, Attorney General Eric Holder issued an order setting forth a new policy that prohibits the federal adoption of property seized by state or local law enforcement under state law except

for property that directly relates to public safety concerns, including firearms, ammunition, explosives, and property associated with child pornography. The order is effective immediately.

The prohibition on federal adoption includes, but is not limited to, seizures by state or local law enforcement of vehicles, valuables, and cash, and other monetary instruments as defined in the order. State and local agencies still maintain the ability to pursue the forfeiture of assets pursuant to their respective state laws. The order applies specifically to federal adoption. The order enumerates the types of asset seizures that the order does not govern.

For further information please refer to: <http://www.justice.gov/opa/pr/attorney-general-prohibits-federal-agency-adoptions-assets-seized-state-and-local-law>

## ALS REMINDERS

⚠ A 1205 form shall be issued to a DUI defendant in the following situations: 1) Defendant refuses to submit to the state administered chemical test, or 2) Defendant submits to the state administered breath test and the breath test results meet the per se statutory requirements (0.08 grams or more if 21 years of age or over; 0.02 grams or more for a person under 21 years of age; and 0.04 grams or more if operating a commercial motor vehicle). (See O.C.G.A. § 40-5-67.1)

When arresting a driver for DUI, always take the driver’s license (residents and nonresidents). Issue a temporary driving permit to a DUI driver with a valid license. If a DUI defendant has a valid driver’s license and a 1205 form is issued, sign the 30 day temporary driving permit at the bottom of the 1205 form. If the DUI defendant has a valid driver’s license and a 1205 form is not issued, attach a 180 day temporary driving permit sticker to the defendant’s DUI citation. (See O.C.G.A. § 40-5-67)

## Quotable Wisdom Works

“The measure of who we are is what we do with what we have.”

~Vince Lombardi

Published with the approval of Colonel Mark W. McDonough. Legal Services: Melissa Rodgers, Director, Joan Crumpler, Deputy Director, Christina Calloway, Legal Officer, and Dee Brophy, ALS Attorney. Send questions/comments to [ccalloway@gsp.net](mailto:ccalloway@gsp.net).