



# *DPS Legal Review*

*September 2011 Legal Services (404) 624-7423 Volume 10 No. 9*

## **CELLULAR PHONE SEARCH VALID**

Law enforcement officers in Miami, Florida, seized approximately two (2) kilograms of cocaine at the DHL hub there. The agents investigated a package containing unusually high densities when scanned by X-Ray. Later, a canine alerted agents that the package contained narcotics. The agents opened the package to investigate its contents. The package contained a horse saddle that, when drilled, revealed a white substance. This substance field tested positive for cocaine.

The shipment originated in San Jose, Costa Rica, and it was addressed to the Defendant at a business address in Miami, Florida. The agents conducted a database search for the Defendant's home address and driver's license picture. They also investigated the recipient address and discovered it was a real estate business where the Defendant was employed. The agents resealed the package and did a controlled delivery to the Defendant later that afternoon. The agents did not secure an anticipatory search and seizure or arrest warrant.

An agent delivered the package to the real estate agency and asked the manager of the agency to call the Defendant and inform him that a package had arrived for him. The manager left the Defendant a voicemail message. Thereafter, someone matching the Defendant's description and driving a vehicle registered to the Defendant arrived at the real estate agency. The Defendant picked up the package, placed it in his vehicle, and drove away.

The agents followed him, and, when the Defendant realized he was being followed, his driving became erratic, and the agents saw the Defendant operating his cell phone. The erratic driving coupled with the fact that the Defendant was driving away from his residence caused the agents to stop him. The agents immediately handcuffed the Defendant and secured him in an agent's vehicle. He was told that he was arrested because of the package.

The agents secured the Defendant's vehicle and conducted a search. The search recovered an operational Metro PCS cellular phone ("cell phone"). The cell phone was capable of making calls, receiving voice mail, sending text messages, and taking photographs. One agent reviewed the cell phone's call log history and made a written record of each name and number for incoming and outgoing calls made during the preceding 24-48 hour period. Then, the phone was left powered on and placed on the trunk of a vehicle at the scene of the arrest.

Thereafter, the cell phone rang with several phone calls with "Javier Blue's" name appearing on the caller ID in the agent's plain view. After the fourth or fifth unanswered attempt, an agent answered the cell phone and engaged the caller in a conversation. The caller asked, "Do you have the package?" The agent responded, "Yes." The caller grew suspicious with the unfamiliar voice and terminated the call. Javier Blue called back several times, but the calls were either terminated by the agent (to avoid detection) or by the caller (due to his suspicion).

Ultimately, the agent changed the medium of communication to text messaging. In this medium, Javier Blue asked the agent to deliver the package to his residence. Because the agent did not know the location, he said that, due to an engine problem, Javier Blue would need to pick up the package from the agent's location. Shortly thereafter, Javier Blue, along with two others, arrived in a Toyota Corolla. Javier Blue exited the vehicle, and walked towards the Defendant's vehicle, looked around, and attempted to walk back to the Corolla. The agents appeared and detained all three individuals. Javier Blue consented to a search of his cell phone. After the agents discovered that his cell phone number matched the number of Javier Blue in the Defendant's cell phone, he was arrested. An agent photographed the Defendant's cell phone to

memorialize the text message exchange with Javier Blue.

The Defendant was charged with intentionally conspiring to import cocaine. Later, a judge issued an after-the-fact search and seizure warrant for the Defendant's cell phone. The scope of the warrant was broad and included the phone itself as well as all phone numbers, any records relating to outgoing/incoming calls, voicemail messages, any contacts stored on the cell phone, all instant/text messages, and any picture/videos stored on the cell phone. The Defendant moved to suppress the evidence.

**HOLDING:** The Court held that accessing a cell phone's call log or text message folder is considered a search for Fourth Amendment purposes. The Court also held that an individual has a reasonable expectation of privacy with regard to operational functions such as making calls or exchanging text messages. The Court further held that because the agents observed Javier Blue's name in "plain view," there was no search of the cell phone's Caller ID for Fourth Amendment purposes.

Additionally, the Court held that the cell phone found close to the Defendant was subject to a search incident to arrest because it was seized in the arrestee's reaching area. The agents had probable cause to believe the Defendant's cell phone contained evidence relevant to his arrest. The agents intercepted a package with cocaine. The Defendant placed this package in his vehicle. Before the agents stopped the Defendant's vehicle, they saw him on his cell phone.

Under these facts, the Court held the agents were clearly permitted to seize the cell phone, and (like a wallet, purse, bag, or cigarette case) look through the item at the scene to see if any evidence or other contraband could be found. Further, the Court held that the immediate search at the scene of the cell phone's call log history, limited to phone calls from the preceding 24-48 hours, was reasonable and appropriate under Supreme Court and Eleventh Circuit precedent. The agents were entitled to search the cell phone under either the search incident to arrest or exigent circumstances exceptions. However, the Court held that the search incident to arrest exception would not give an agent freedom to search indefinitely each and every facet of an arrestee's cell phone. U.S. v. Gomez, \_\_\_ F. Supp. \_\_\_, 2011 WL 3841071 (S.D.Fla.).

### **WARRANT ERROR**

The Defendant was taken into custody by a Tift County Deputy based upon a warrant authorizing his arrest for failure to appear in court on DUI charges. The Defendant told the Deputy that he had been to court, entered a guilty plea, and had paperwork at home to prove his court appearance. The Deputy did not allow the Defendant to go home to get the paperwork. Instead, the Deputy took him to jail. The Defendant was arrested on a Friday and remained in custody over the weekend.

On Monday, a judge allowed the Defendant to go home to get documentation that proved his court appearance. The Court determined that the arrest warrant was mistakenly issued. The Defendant filed a civil rights suit against the Deputy and the Sheriff for false imprisonment and violation of his Fourth Amendment rights.

**HOLDING:** The Court dismissed the case. The Court held that the Deputy bore no fault for properly executing a facially-valid warrant. The Court also held that the Sheriff could not be held liable for acts in which he was not personally involved nor linked to in any way. Barron v. Kelly, 2011 WL 4025728 (M.D. Ga.).

### **INQUIRING MINDS**

**QUERY:** Which Code Section governs alteration of a suspension system?

**ANSWER:** Two Code Sections govern alteration of a suspension system: O.C.G.A. § 40-8-6 and O.C.G.A. § 40-8-6.1.

### **ALS REMINDER**

⊗ Don't explain the implied consent notice to a defendant or answer any questions regarding the implied consent notice. If the defendant asks questions regarding the implied consent, either re-read the implied consent notice or allow the defendant to read the implied consent notice.

⊗ When entering into an ALS plea agreement, you may wish to limit the time within which the DUI plea must be entered. When doing so, write the time limit on the plea agreement form.

⊗ In roadblock cases, please remember to take a **certified** copy of the Roadblock Supervisor Approval Form with you to the ALS Hearing.

### **QUOTABLE WISDOM WORKS**

*"Dream as if you'll live forever. Live as if you'll die today."*

~ James Dean

Published with the approval of Colonel Mark W. McDonough. Legal Services: Melissa Rodgers, Director,

Lee O'Brien and Jacqueline Bunn, Deputy Directors, and  
Dee Brophy, ALS Attorney. Send questions/comments to  
[jbunn@gsp.net](mailto:jbunn@gsp.net).