

# Searching Cell Phones: What's That Vibrating In Your Pocket? Legal Question of The Week Vol. 2, Number 3 January 23, 2009

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Today's case is a tragic tale of three criminals who attempted a daring trip from Alabama to New York armed only with \$14,790.00 in good and lawful U.S. Currency, several fictitious licenses, a crack pipe, baking soda, 26 uncut sheets of counterfeit \$100 bills, and a cell phone. They put up a valiant effort to escape the long arm of the law, but ultimately failed miserably. In today's legal update, we discuss some of the uses of baking soda, the legality of searching the contents of a cell phone incident to arrest, and I'll even throw in a helpful tip or two for those of you who are considering a life of crime.<sup>1</sup>

In recent years, cell phones have exploded as vast repositories of all kinds of information. Gone are the "bag phones" and the car phones that were wired directly into the car battery.<sup>2</sup> Now even the simplest of phones can contain text messages, call histories, and contact information and the most complex can contain as much information as a personal computer, with emails, pictures, videos, and other media. The legal community has struggled to keep up with how "private" this information is with regards to the Fourth Amendment.

Last week, the Fourth Circuit shed a little more light on the issue in a case called United States v. Murphy. The Murphy case deals with the search of a cell phone seized incident to arrest and while it doesn't answer all of the questions surrounding these items, it provides some good law for police to use to gain access to this type of information.

In the early morning hours of June 6, 2006, Virginia State Trooper Danny Pruett was operating stationary radar along I-81 in Wythe County, Virginia, when he clocked our defendant's car traveling at 95 miles per hour.<sup>3</sup> He stopped the vehicle and

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<sup>1</sup> Let me be clear: I do not advocate a life of crime. I abhor crime and have spent my career prosecuting crime, fighting crime, and advising those who prosecute and fight crime. On the other hand, I am of the opinion that whatever your chosen career path, legitimate or illegitimate, you should strive for excellence.

<sup>2</sup> I actually had one of these in an old Camaro. The base of the phone was bolted to the car floorboard and you couldn't use it outside of the car. I thought it was cool at the time.

<sup>3</sup> Okay – here's our tip for those considering a life of crime. If you are transporting drugs, tens of thousands of dollars in real money, and sheets of counterfeit money across the country, DON'T GIVE THE

approached the driver, a female who told the Trooper that her name was Debbie Arlene Sanchez and that she had left her license at home. Her name was in fact Marsha Arlene Massingill. Once she was arrested for reckless driving, the Trooper searched her purse and found an Alabama inmate photo ID card with her picture and a Social Security Card with her real name on it.<sup>4</sup>

The front seat passenger in the car was a male who told the Trooper that his name was Corey Antonio Murphy. It wasn't. Later he would slip and say his name was "Corey Demetrius Murphy." He told the Trooper that he would let the officer call his employer on his cell phone to verify his identity. The Trooper instead opted to arrest "Murphy" for obstruction of justice and when he told him that he would be fingerprinted and photographed, Murphy stated his real name was Damian Antonio Murphy, the defendant in our case.<sup>5</sup>

The back seat passenger, a male, produced an "unusually thick" Alabama license bearing the name Clarence Todd Drain. When the Trooper ran the license through NCIC, the number came back as being issued to a female. The Trooper also was suspicious because the driver kept calling "Clarence" by the name of "James" or "Jay." After the Trooper arrested him for providing a fictitious driver's license, he gave the name "James Anthony McCoy." That wasn't his name either. "McCoy" claimed ownership of a duffel bag in the car which was searched incident to arrest and revealed a business card with his real name of James McCord.<sup>6</sup> The bag also contained a crack pipe with residue, a dagger-type weapon, four additional fake licenses, and a bag containing what looked like cocaine but was in fact baking soda.<sup>7</sup> Later at the sheriff's department, McCord made several requests to use the bathroom. Upon being searched prior to being allowed to go to the restroom, a bag containing crack cocaine and powder cocaine was recovered from his underwear.<sup>8</sup>

At the scene, after determining that none of these three misfits had a valid driver's license, the trooper prepared to have the car towed. Pursuant to Virginia State Police policy, he also called for backup officers to assist in an inventory search of the vehicle's contents. The inventory search turned up a duffel bag in the trunk containing make-up and women's clothing, and a laptop bag containing \$14,790 in U.S. currency, which was

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POLICE A REASON TO STOP YOU. Why are you going to drive 95 miles per hour? Drug couriers ought to be the safest drivers on the road – obeying the speed limit, registration laws, making sure all their lights are working properly, oil change every 3,000 miles, you get the idea.

<sup>4</sup> CRIMINAL TIP #2: If you are not a current inmate, don't carry around an inmate photo identification. She must have really liked the picture. After the Trooper found these items, Massengill admitted she had lied because she was wanted in Alabama for, you guessed it, forgery. Notice I am passing up the opportunity to make any jokes about the name "Massengill" and feminine hygiene.

<sup>5</sup> Murphy told the officer that he lied because he was on parole in Alabama for several drug violations and had left the state of Alabama without the permission of his parole officer.

<sup>6</sup> McCord had an outstanding arrest warrant out of Alabama for distribution of narcotics.

<sup>7</sup> McCord testified at trial that he used this baking soda both to brush his teeth and to mix with cocaine in order to make crack. I am not making this up. He was not asked if he used it to remove unpleasant odors from his refrigerator.

<sup>8</sup> No word on whether McCord used the classic "this isn't my underwear" defense or the timeless "how did that get there" defense.

packaged in stacks containing equal amounts of money, folded and arranged to offset one another, and then banded with rubber bands.<sup>9</sup> In the glove compartment were 26 uncut sheets of counterfeit \$100 bills. Murphy denied any knowledge of the counterfeit money, although he admitted that he had placed the bag in the glove compartment at McCord's request.

Most importantly for our purposes, Murphy's cell phone was recovered, either from his person or from the vehicle. It was briefly searched at the station, found to contain "potentially incriminating information," logged in as evidence and later turned over to the custody of the DEA for processing. On June 29, 2006, 23 days after the traffic stop, DEA Special Agent Brian Snedecker<sup>10</sup> examined the phone without a warrant and identified several text messages on Murphy's phone sent from an individual named Brian Sheppard. Agent Snedecker then interviewed Sheppard by phone and Sheppard stated that Murphy was his drug supplier.

### HOW THE COURT RULED

The Court ruled that the cell phone was properly seized either incident to arrest (if you believe it was on Murphy's person) or pursuant to a lawful inventory search (if the cell phone was actually in the car.) Once it was seized incident to arrest, the court ruled that it could be searched incident to that arrest. They rejected the argument that the officers should have to determine whether the data on the phone was actually in danger of being erased because of low storage capacity, saying that it would be an "unworkable and unreasonable rule."

The most interesting part of the opinion deals with the time that passed between the seizure of the phone and the examination of it by the DEA agent. Many federal courts have held that for a search of a cell phone's contents to be justified by being incident to arrest, the search must be "substantially contemporaneous" with the arrest.<sup>11</sup> The Court noted that there was a contemporaneous search at the station, however, almost a month passed between the arrest and the more complete search. The Court held that this was the same as a situation where clothing is seized from a suspect incident to arrest and later tested and examined.<sup>12</sup>

### WHAT THIS CASE TELLS US

It is lawful to seize a cell phone incident to arrest and search it. The justification for a warrantless search is twofold: incident to arrest and exigent circumstances, namely that the information may disappear. It also appears that the 4<sup>th</sup> Circuit would uphold a warrantless search that is not contemporaneous with the arrest, although I would advise

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<sup>9</sup> In a valiant effort to explain away this much money, Murphy claimed ownership and stated that he had withdrawn the money from a bank account (for which he had no documentation) and said he earned the money by operating a lawn care business. Murphy further stated that he was planning to use the money to purchase shoes and clothing in New York for stores that he planned to operate in Alabama.

<sup>10</sup> Gesundheit!

<sup>11</sup> Lawyer-speak translation: Not much time can pass between the arrest and the search.

<sup>12</sup> See United States v. Edwards, 415 U.S. 800 (1974).

getting a warrant if probable cause exists in order to be safe. After all, is there really an exigency if you are able to wait and search it at a later date?

### WHAT QUESTIONS STILL REMAIN?

There have been other cases that have held that pagers may also be searched incident to arrest. We know now that cell phone logs, numbers, and text messages can be searched incident to arrest.<sup>13</sup> What about PDAs or Blackberries? I believe that you may certainly search those items to the extent that they are like cell phones – in other words, you may search logs, numbers, and text messages – but what about e-mails contained on these devices? There are no cases on this point yet.

On one hand, the courts could rule that the amount of data and information contained in personal e-mail messages makes those types of searches too intrusive to allow based on a search incident to arrest theory. On the other hand, the courts could find that when this data is placed on a PDA it inherently becomes less private and more vulnerable to being seen by the public. We'll have to wait and see.

For now, I leave you with this thought: if all criminals were as smart as the three that were stopped by Trooper Pruett in this case, our prisons would be full and our citizens would be safe.

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<sup>13</sup> Cell phone “voice mail” messages probably cannot be searched incident to arrest as they are not stored on the phone but on some remote server somewhere.