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INSIDE

Searches of Cell Phones: When is Good Faith Not Good Faith?

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Searches of Cell Phones: When is Good Faith Not Good Faith?

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The Florida Supreme Court recently has added a troubling new wrinkle to the law of search and seizure that will complicate your work. This article will explore *Carpenter v. State, 42 Fla. L. Weekly S694 (Jun. 29, 2017),* where the high court has held that you cannot always rely on what you might think are settled opinions of the district courts of appeal in making search and seizure decisions, and suggest strategies you may employ so as not to have your warrantless searches later overturned.

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Set the Wayback Machine to 2013. Christopher Carpenter was under arrest. The setting was an Internet Crimes Against Children operation in Bay County, in the Florida Panhandle. It was a typical such operation, where undercover officers pose as children and post advertisements on internet websites such as Craigslist in the hope of intercepting those who troll such websites hoping for sexual encounters. Carpenter engaged in text and e-mail communication with an officer posing as a fourteen year old girl, which led to Carpenter traveling to an undercover location intending to engage in sexual relations with the girl, and to his subsequent arrest. Carpenter used a smartphone in his activities, and the phone was on his person and seized at the time of the arrest. In 2013, the prevailing case relating to searches of smartphones in the district courts of appeal was *Smallwood v. State, 61 So. 3d 448 (Fla. 1st DCA 2011*), which allowed search of a smartphone incident to arrest. Smallwood was at the time the only such case and therefore was the law governing the trial courts in that district. See *Pardo v. State, 596 So. 2d 665 (Fla. 1992*) (cases from one appellate district bind all appellate districts in the absence of a conflict). The officers relied on Smallwood, and searched the cell phone without a warrant, obtaining contraband. This decision ultimately would cause the Florida Supreme Court to reverse Carpenter for a new trial, with the contraband suppressed.

How did this happen? Didn't the officers rely on Smallwood in good faith? In *Carpenter*, the Supreme Court held that they did not rely on Smallwood in good faith, based on cases that had been decided after the search had taken place. Why did they do that?

The simple explanation is that Smallwood wasn't final on appeal at the time of the search in *Carpenter*. The high court took position that law enforcement was on notice of that. This, because the Florida Supreme Court had not yet rendered an opinion on whether smartphones could be searched incident to arrest without a search warrant, and that question was before the high court at the time of the *Carpenter* search in 2013. In *Smallwood*, the district court of appeal had certified a question of great public importance to the Supreme Court relating to the ability to search cell phones incident to arrest without a warrant. This act gave the high court jurisdiction to review the question presented. Article V, § 3(b)(4) of the 1967 Florida Constitution allows the high court to review appellate decisions that certify a question of great public importance. Because the 1st DCA had certified the issue in *Smallwood* to the high court, their decision was not settled law. Thus, the high court reasoned, law enforcement should not have relied on it. This, despite the fact that the high court often never addresses certified questions. In practice, this means that unless the high court has announced a search and seizure rule, lower-court appellate decisions do not inform law enforcement as to what the law is. That reduces Fourth Amendment

jurisprudence to an untenable, unsettled state. How to reconcile this?

Before we can explore how to live with such a vague rule, we need to understand how the high court got here. As we do this, you will see that the *Carpenter* opinion actually can be very narrowly interpreted, and I believe that in the future we will see it specifically limited to electronic data. In essence, to reach its conclusion the Supreme Court majority reasoned backward from developments in the law of search and seizure relating to smartphones that came down long after the 2013 search at issue in *Carpenter*. In *Willis v. State, 148 So. 3d 480 (Fla. 2d DCA 2014)*, a case emanating from Polk County, our 2d DCA conflicted with Smallwood, reasoning that subsequent developments in the law required a search warrant to search a smartphone seized incident to arrest. This, because in the appeal from Smallwood on the question of great public importance, the high court had reversed the 1st DCA. See *Smallwood v. State, 113 So. 3d 724 (Fla. 2013).* Notably, this reversal happened after the search of Willis' phone, and after the search of Carpenter's phone. The 2d DCA, in Willis, held that the Pardo rule binding all appellate districts under the case law established by one district, in the absence of conflict, does not apply with respect to Fourth Amendment questions. See Willis, 148 So. 3d at 483. The Second District Court of Appeal felt that the issue of warrantless smartphone searches was so controversial that the high court did not intend for lower courts to be bound by decisions from other appellate districts-and therefore, law enforcement could not rely in good faith upon appellate precedent in the Fourth Amendment context in the absence of a decision on the matter from the Florida Supreme Court. The Carpenter majority fully endorsed this conclusion.

Justice C. Alan Lawson, writing for the three-judge dissent and joined by Justices Charles Canady and Ricky Polston, took issue with the high court's majority endorsing Willis. He reasoned that Art. I, § 12 of the 1967 Florida Constitution requires interpreting our search and seizure case law in conformity with U.S. Supreme Court precedent. He pointed to *Davis v. United States, 564 U.S. 229 (2011),* as what should have been binding precedent. The exclusionary rule is supposed to deter police misconduct. How, asks Justice Lawson, is reliance on the only extant appellate precedent then available possibly construed as misconduct of police? Justice Fred Lewis, writing for the majority, responded that in Davis, police had relied on a precedent of the U.S. Supreme Court that at the time was thirty years old and well-settled. Later, while Davis was in the appellate process, that precedent was overturned. The Davis majority held that in such cases the good faith exception should apply. Justice Lewis held that Davis did not apply because Smallwood, which was before the Florida Supreme Court on a certified question, was not binding precedent-unlike the thirty year old and long-settled opinion that the U.S. Supreme Court considered in Davis. Therefore, the officers committed misconduct by relying on Smallwood when they should have known not to rely on it.

Personally, I agree with Justice Lawson. However, his dissent is not the law, and we have to live with the law as it is, not as we might like it to be. In my opinion, the result in Carpenter stems from developments in case law that give special search and seizure protection to smartphones. In *Riley v California, 134 S. Ct. 2473 (2014),* the U.S. Supreme Court refused to apply long-standing case law relating to warrantless search of containers incident to arrest to smartphones. Chief Justice John Roberts, writing for the majority, took position that smartphones represented too much of a threat to American privacy to allow search-under almost any circumstances-without a judicially approved search warrant. The Court reasoned that modern Americans

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FROM THE COURTS...

store years of private and highly personal data on smartphones in a way that was not true of physical documents that our citizens historically amassed and preserved. Riley extended the same sort of solicitude to search of a smartphone previously reserved to one's residence. Carpenter and Willis carry that line of thought to its logical conclusion-in essence, retroactively applying Riley to searches conducted well before that case became law.

How do you deal with *Carpenter* in the field? Carpenter essentially holds that you cannot rely in good faith on favorable district appellate decisions governing Fourth Amendment precedent. Frankly, I believe that the solution to *Carpenter* is to consider its facts. The item being protected here is one which contains a great deal of personal information-it is this that makes the item valuable for intelligence purposes. However, you can readily discriminate between electronic data and traditional documents or other physical evidence, for which the law is much more settled. In those more traditional physical-evidence cases, *Carpenter* can be distinguished. What I recommend is that you treat all forms of electronic data with the utmost care; as a rule, you should impound them and apply for a search warrant before opening them.

Generally, the preferred solution is to get a warrant before you search anything. Knowing that not to be realistic, you have to have a Fourth Amendment strategy to fall back on. Therefore, view all search and seizure questions with care. What is it that you're searching? How great are the common-sense privacy questions attendant to the item you want to get into? How much personal data might it contain? The more potentially private something is, the greater the risk you take by searching it without a warrant. Search and seizure questions should be considered from the top down; in other words, you always first should ask yourself whether you can get a search warrant. If you reasonably can, contact our Felony Intake section and do it. A search warrant is the surest way to protect the fruits of a search. Particularly with any form of digital data, sacrificing procedure for the convenience of a warrantless search will cost you in the future, unless you can show a substantial reason to support it.