



Roll Call Reporter

August 2015

LEGAL UPDATES FOR MARYLAND LAW ENFORCEMENT OFFICERS

QUESTION: Can a screen saver image on a cell phone seized incident to a lawful arrest be discovered in “plain view” upon physical inspection of the phone?

ANSWER: Yes. Depending on the facts and circumstances, a screen saver image on a cell phone may be discovered in “plain view” by the officer inspecting (not searching) the phone.

CASE: *Ronald Sinclair v. State of Maryland*
Court of Appeals of Maryland
Decided July 27, 2015

This is the last of three in a series of Roll Call Reporters – all related to the warrantless searches of cell phones incident to arrest.

The Carjacking:

On the evening of April 29, 2010, Thomas Gaines stopped at a gas station in Camp Springs to refuel his Dodge Charger—a car for which he had paid \$36,000 and purchased a special set of custom wheel rims. When he pulled into the station, Gaines noticed two men speaking on a phone. As he filled his tank, one of the men

approached him and asked if he wanted to buy “some weed.” He declined, but when he turned to get in his car, the other man was standing in his way. The first man put a gun to Gaines’s side while the other searched his pockets and took his wallet, cash, and phone. The two men entered Gaines’s car and sped off. The gas station clerk witnessed the carjacking and called 9-1-1.

The Arrest and Search Incident to Arrest:

The next day, in the late afternoon, Gaines and his girlfriend spotted his Dodge charger backed into a parking space in the lot of a strip shopping center in Temple Hills. He asked his girlfriend to go to a nearby police car to get the police while he blocked in the Charger with the vehicle they were driving so that the stolen car could not be driven out of the parking lot. He also recognized one of the suspects inside of a barber shop. The suspect was the one who had offered to sell Gaines marijuana and put a gun in his side.

Officer Kevin Stevenson of the Prince George’s County Police Department, who had responded to the gas station the previous night, was dispatched to the shopping center. He verified that the Charger belonged to Gaines, and then waited with Gaines for the suspect to leave the

barber shop. After 45 minutes, the suspect left the barber shop while talking on his cell phone and entered a car that pulled up to the curb.

Officer Stevenson stopped the car and ordered its occupants onto the curb. He saw bags of marijuana on the floor boards where the suspect had been sitting. Although the officer had told Gaines to keep his distance from the traffic stop, Gaines walked up to the suspect and told Officer Stevenson that the suspect was the man who had stolen his car. The suspect was identified as Ronald Sinclair. Officer Stevenson placed Sinclair under arrest and recovered cash, suspected cocaine, and a cell phone from his pockets.

The Search of the Cell Phone:

The cell phone was a Samsung “flip” phone designed for use on the T-Mobile network. Officer Stevenson opened the phone and saw a screen saver image (sometimes also referred to as a “wallpaper” image) of a wheel rim and fender that matched the wheel rim and color of the stolen car. The officer scrolled through the photos on the phone. In addition to a photograph of the screen saver image, Officer Stevenson located a photo identical to the screen saver image and an image of a “properties” screen that indicated “sent” on “4/30/10 7:00...”

The Charges, Convictions, and Appeal:

Sinclair was indicted for carjacking and related offenses, including firearms offenses and possession of illicit drugs. A jury found Sinclair guilty of multiple offenses and he was sentenced to a total of 40 years imprisonment. Sinclair appealed.

The Grounds on Appeal and the Decision:

The key issue raised by Sinclair on appeal was whether the warrantless search of the contents of his cell phone violated the Fourth Amendment. The issue was, and is, an important one in light of the 2014 Supreme Court decision in *Riley v. California*. In that case, the Supreme Court held that, absent exigent circumstances, the contents of a cell phone could not be searched incident to the suspect’s lawful arrest. Instead, officers must obtain a warrant to search the contents of a recovered cell phone. However, officers are allowed to at least “secure” recovered cell phones (make sure that they are not concealing weapons) incident to arrest. They can also turn the phone off or remove its battery, or even put it in a “Faraday bag” to protect it from radio waves and, thus, remote wiping. It is the search of the phone’s contents that requires the warrant.

The *Riley* decision did not distinguish between “flip” phones and “smart” phones, and did not address whether an officer may physically open a flip phone without obtaining a warrant.

In this case, one photograph on the phone, the screen saver image, was readily apparent to Officer Stevenson when he opened the flip phone. The other two photographs used in evidence were found when the officer “scrolled” through the phone. Consequently, the Court of Appeals analyzed the photographs differently for Fourth Amendment purposes. The screen saver image, the court concluded, was found in “plain view” by the officer and, as a result, there was no violation of the Fourth Amendment. The court concluded that “an officer who seizes a flip cell phone incident to an arrest may physically inspect and secure the phone, which would include an examination of the phone and its case



for weapons, powering of the phone, and removing its batteries. Such actions would inevitably involve physically opening a flip phone. And a photograph of a screen saver image in plain view when the phone is physically opened would not be suppressed at trial.

As to the other two images, the court concluded that admitting the second image at Sinclair's trial was "harmless error" because the image was the same as the screen saver. Admitting the third image, the one of the "properties" screen, was also deemed "harmless error" because of the other overwhelming evidence of Sinclair's guilt. In other words, the third photograph was of little consequence at trial. For these reasons, the court affirmed Sinclair's convictions.

NOTE:

Under *Riley*, the warrantless discovery of the second and third cell phone images in this case was unconstitutional because of the absence of a warrant. It was only the "harmless error" at trial rule that rendered their admission at trial of no consequence. Also, be on notice that as technology progresses, the differences in phones (flip versus smart, interior versus exterior screens, etc.) will be relied upon by defense attorneys. In other words, if an image can only be viewed by opening the phone, the argument will be made that the image was not in "plain view." It is a certainty that courts will become bogged down in this kind of minutiae—examining the very nature of how phones are constructed and used.

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