



# *DPS Legal Review*

*December 2010 Legal Services (404) 624-7423 Volume 9 No. 12*

## **PERMISSIBLE CELL PHONE SEARCH**

A Lowndes County Sheriff's Officer was contacted by a mother who told him that text messages regarding narcotics were being sent to her son's cell phone. The mother delivered the cell phone to the Officer. Thereafter, the Officer received a text message on the phone from the Defendant (who thought she was communicating with the son.) The Defendant asked if certain controlled substances had been received. Posing as the son, the Officer responded by text message and asked how many pills the Defendant wished to purchase. In turn, the Defendant asked how many were available. The Officer responded by texting that he had about 25 pills. The Defendant responded that she wanted all of them and had the money to buy them. The parties agreed to meet at a local restaurant that evening.

Prior to the scheduled meeting, the Officer arrived at the restaurant and took up a surveillance position in the parking lot. He saw the Defendant drive into the parking lot. He also saw her entering data into her phone. The Officer almost contemporaneously received another text message on the son's cell phone. The Defendant said that she had arrived at the restaurant. The Officer approached the Defendant, identified himself and placed the Defendant under arrest for unlawfully attempting to purchase a controlled substance. The Defendant admitted that she was the person with whom he had exchanged text messages through the day. The Defendant consented to a search of her vehicle.

Incident to her arrest, the Officer searched the Defendant's vehicle and found her cell phone inside her purse. The Officer located the text messages on the phone that he had exchanged with her that day. He downloaded and printed the messages to preserve them. He did not obtain a warrant before arresting the Defendant, searching her vehicle, or searching the text messages stored on her phone. The Defendant

moved to suppress the evidence found on her cell phone. She argued that the Officer violated the Fourth Amendment when he seized her cell phone and searched the electronic data stored on it without first obtaining a warrant.

**HOLDING:** The Court denied the motion to suppress. The Court held that the Defendant was lawfully arrested for criminal attempt to purchase a controlled substance before her vehicle was searched. When it is reasonable to believe that evidence of the offense of arrest might be found in a vehicle, the passenger compartment may be searched incident to arrest. The Court further held that the Officer was authorized to search for the text messages in any place in the vehicle in which the text messages reasonably might be found.

The Court held that an Officer's authority to search the data on a cell phone does not mean that he has the authority to sift through all of the data stored on the phone. Instead, a search must be limited as much as is reasonably practicable by the object of the search. The Court further held, "Where the object of the search is to discover certain text messages, for instance, there is no need for the officer to sift through photos or audio files or Internet browsing history data stored on the phone."

Under the facts, the Officer searched for and found the specific text messages that he had good reason to believe were stored on the cell phone. The Court held that the Officer's search of data stored on the cell phone was limited in scope to a search for specific evidence of the crime for which the Defendant was arrested. The Court also rejected the Defendant's contention that the Officer did not have the authority to use the son's cell phone. The Court held that the Officer's conduct was not comparable to a wiretap interception of a telephone conversation. Likewise, the Court held that the Defendant did not have standing to claim violation of the son's constitutional rights.

Hawkins v. State, \_\_\_ S.E.2d \_\_\_, 2010 WL 4883650 (Ga. App.).

### FORFEITURE

The Defendant was arrested at his home in Verbena, Alabama for trafficking illegal drugs. A previous investigation had revealed that the Defendant's house might be a stash house. After his arrest, the Defendant offered to cooperate with the agents. When asked if drugs, currency, or other weapons were in the house, he said that there were, and he gave consent to search the residence. The agents located a total of \$17,466.00 in United States Currency from various places within the residence.

Specifically, two vacuum-sealed bags of currency, with \$5,000.00 and \$6,000.00 respectively, were found in the bathroom. There was \$85.00 in currency on the dresser in the master bedroom. A shoebox in the master bedroom closet contained \$1,582.00. The agents found \$4,800.00 bound with money bands and wrapped in lingerie in the master bedroom closet. The agents also found nine firearms, keys to three vehicles, and a set of keys that opened a shed in the backyard. The Defendant claimed that he rented the shed to a couple, but he did not know their names. In the shed, the agents found a half a kilogram of cocaine HCL, a bottle of GNC Inositol powder, and a bullet proof vest. The Defendant entered a guilty plea. He did not file a claim asserting any interest in the currency that had been found.

However, the Defendant's wife filed a verified claim alleging that at least \$7,000 of the money seized from the home was money she had earned from her employment at a grocery store. She sought to recover \$10,500.00 of the money seized. At her deposition, the wife admitted that some of the money in the master bedroom closet was money her husband gave her (which she combined with money that she earned working at a grocery store). She denied knowing that the money her husband gave her came from illegal drug activities. But, she invoked her rights under the Fifth Amendment when she was asked if she knew of any other ways her husband was earning money prior to his arrest.

**HOLDING:** The Court held that, in forfeiture cases, the Government must establish by a preponderance of the evidence that the property is subject to forfeiture. The Government may use evidence gathered after the filing of a complaint for forfeiture, and the Government shall establish that there was a substantial

connection between the property and the offense. The Court held that the undisputed facts established that the Defendant was knowingly and willfully involved in an illegal narcotics trafficking conspiracy. The Court held that the wife's invocation of her Fifth Amendment rights gave rise to the inference that she knew her husband was involved in earning money through drug trafficking. When she knowingly commingled her earnings with money from her husband, she rendered her money subject to forfeiture. The Court held, "One cannot receive money from a drug dealer, with a wink and a nod, and then be immune to the consequences." U.S. v. \$17,466, Slip Copy, 2010 WL 4923353 (M.D. Ala.).

### INQUIRING MINDS

**QUERY:** Which license suspensions require notice?

**ANSWER:** Proof of actual notice of a license suspension is now only required for the following suspensions: **ALS or implied consent, failure to appear, child support, school suspensions, safety responsibility, and insurance cancellation (no new insurance cancellation suspensions were imposed after October 2002)**. All other suspensions are imposed by operation of law, so the suspect has notice of his or her license suspension by virtue of his or her conviction for the underlying offense.

### ALS REMINDERS

⊗ When testifying, always explain the process involved in the set-up and preparation of the Intoxilyzer 5000 test. Your testimony should include: 1) whether a diagnostic check of the instrument was done, 2) whether the check indicated that everything was working properly, and 3) whether all parts were attached. Your testimony should detail that two breath samples were taken and the time that they were taken. Please be sure to establish on the record that the defendant's level of alcohol concentration was within 3 hours of driving.

### QUOTABLE WISDOM WORKS

*"A lie can travel halfway around the world while the truth is putting on its shoes."*

*~Mark Twain*

Published with the approval of Colonel Bill Hitchens. 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).