Legally Speaking

Searching A Cell Phone

As I have written many times in this column, the Fourth Amendment to the U.S. Constitution protects us from unreasonable searches and seizures. The Fourth Amendment also implicates privacy concerns. A person has an interest that justifies Fourth Amendment protection when that person has a legitimate, reasonable expectation of privacy in the property that is seized.

Generally, the police are required to get a warrant before conducting a search. But one exception to the general rule against warrantless searches is a search incident to a lawful arrest. This kind of warrantless search is permissible for the safety of law enforcement officers and to prevent the destruction of evidence.

The Ohio Supreme Court recently decided a search and seizure case in an unusual context with interesting privacy implications—that of a warrantless search of data in a cell phone. A 4-3 majority of the court, in an opinion written by Justice Judith Lanzinger (who is up for re-election

this year) held that such a search was improper, even though the phone was seized pursuant to a lawful arrest. She was joined by Justices Pfeifer, O'Connor, and Chief Justice Moyer. Here's what happened.

A woman named Wendy Northern was taken to Miami Valley Hospital after a reported drug overdose. While at the hospital, she agreed to cooperate with the police by calling her dealer, whom she identified as Antwaun Smith, to arrange for a crack buy at her place. The police recorded this conversation, and then later arrested Smith at Northern's residence. In searching Smith the police found his cell phone, which they confiscated. The police also found crack cocaine at the scene.

Some time later, the police confirmed from the call records and phone numbers stored in Smith's phone that that phone had been used to speak with Northern. The police did not have a warrant to search the phone.

Smith was indicted on a number of drug and related charges. His lawyer filed a motion to suppress the data found in the cell phone. The trial court allowed the call records and phone numbers to be used as evidence at his trial. Smith was convicted and sentenced to a long prison

term. On appeal, he challenged the warrantless search of his cell phone data.

Since cell phones have been around for awhile, and are ubiquitous, one of the surprising things I learned from this decision is that neither the U.S. Supreme Court nor any state supreme court has ruled on the question of the warrantless cell phone data search.

When an issue is decided for the first time, courts generally look for related analogies. It is settled law that any closed container found on the person of someone arrested can be searched incident to that arrest. A number of federal courts have analogized various electronic devices, including cell phones, to closed containers, thus allowing them to be searched without warrants. The prosecution in Smith's case urged the Ohio Supreme Court to adopt this position. But the high court refused to find that a cell phone is a closer container, because under existing U.S. Supreme Court precedent, a container is something that actually has a physical object inside it, which a cell phone does not.

After deciding that a cell phone is not some kind of closed container, the Ohio high court still had to decide how to classify it for Fourth Amendment purposes, noting that "given their unique nature as

multifunctional tools, cell phones defy easy categorization". In trying to answer this question, the majority opinion went off on a meander about the capabilities of various kinds of cell phones, but ultimately decided that the result in this case should not depend on the capabilities of the particular cell phone involved. Is a cell phone like an address book, in which there is a low expectation of privacy in the event of an arrest, or is it more like a laptop computer, which has a higher expectation of privacy? The court found it was closer to a computer, because a person has a high expectation of privacy in a cell phone's contents. So the Court held that before conducting a search of the contents of a cell phone, the police had to get a warrant. Since they didn't in this case, the data taken from the phone should not have been allowed into evidence.

Justice Robert Cupp dissented in this case, joined by Justices Stratton and O'Donnell. He finds nothing unique or unusual about the search of the phone and its contents in this case. To him, this was a straightforward search pursuant to a lawful arrest, for which no warrant was required for anything that was found. But the majority took a more nuanced position on this search-incident-to-arrest exception to the warrant requirement. Justice Lanzinger noted that the justification for

allowing this kind of warrantless search is to protect law enforcement officers and to prevent the destruction of evidence. Since neither circumstance was present in this case, the warrant exception did not apply.

Justice Cupp also chided the majority for going through a "wide-ranging examination of the capabilities of different types of cell phones and other electronic devices", finding that this case was very much like the search of a regular address book found on someone who is arrested, and was perfectly proper. But he did agree that if dealing with a phone which has computer-like capabilities (which this one didn't) the warrantless search issue would be more complicated. He would wait for the proper case to decide that issue.

There's no question that the advent of increasingly sophisticated technology will continue to raise fascinating Fourth Amendment issues.