



MSP

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Search warrants for cell phones, like other search warrants, must meet the particularity requirement of the Fourth Amendment.

Summary of the Holding

In [*People v. Carson*](#), the Michigan Supreme Court (MSC) reaffirmed that search warrants can properly be issued for cell phones, but like any search warrant, it must still meet the particularity requirement of the Fourth Amendment. The Court held the search warrant in this specific case did not meet that requirement.

Background and Facts

The defendant was convicted of safe breaking, larceny, receiving or concealing stolen property, larceny from a building, and conspiracy, after he and his girlfriend stole from their neighbor. After the defendant was arrested, his cell phone was seized. The police obtained a search warrant for the phone and discovered text messages that implicated both defendants in the crime.

The warrant in this case listed the person, place or thing to be searched as:

“Cellular device belonging to Michael Georgie Carson...”

The property to be searched for and seized was described as:

“**Any and all** records or documents pertaining to the investigation of Larceny in a Building and Safe Breaking. As used above, the term records or documents include records or documents which were created, modified or stored in electronic or magnetic form **and any data, image, or information that is capable of being read or interpreted by a computer**. In order to search for any such items, searching agents may seize and search the following: cellular devices; Any physical keys, encryption devices and similar physical items that are necessary to gain access to the cellular device to be searched or are necessary to gain access to the programs, data, applications and information contained on the cellular device(s) to be searched; Any passwords, password files, test keys, encryption codes or other computer codes necessary to access the cellular devices, applications and software to be searched or to convert any data, file or information on the cellular device into a readable form; This shall include thumb print and facial recognition and or digital

PIN passwords, electronically stored communications or messages, including any of the items to be found in electronic mail (“e-mail”). **Any and all data** including text messages, text/picture messages, pictures and videos, address book, any data on the SIM card if applicable, and all records or documents which were created, modified, or stored in electronic or magnetic form and **any data, image, or information that is capable of being read or interpreted by a cellular phone or a computer.”**

“Particularity Requirement” under the 4th Amendment

The Fourth Amendment requires that a search warrant states with particularity, the place to be searched, and persons or things to be seized. As previously discussed in [Legal Update No. 158](#), modern day cell phones are more than a technological convenience, and such devices keep a digital record of nearly every aspect of our lives, from the mundane to the most intimate. The purpose of the particularity requirement is to prevent general searches by limiting authorization to search to the specific areas and things for which there is probable cause to search. A failure to describe the items to be seized with as much particularity as the circumstances reasonably allow, offends the Fourth Amendment.

In [People v Hughes](#), the MSC considered the particularity requirement, where police had a warrant to search a cell phone for one crime, but then later conducted a second search of the phone for an unrelated crime, without obtaining a new warrant. The court held that the second search violated the Fourth Amendment.

There are extensive privacy interests in cellular data, and the MSC previously acknowledged that although a suspect may not store incriminating information in an obvious manner, it declined to adopt a rule that it is always reasonable for an officer to review the entirety of the digital data seized pursuant to a warrant, on the basis of the mere possibility that evidence may conceivably be found anywhere on the device. Such a rule would nullify the particularity requirement and would amount to a general warrant.

As noted in more detail below, it is clear that a search warrant for a cell phone can be issued. It must, however, be carefully limited in scope, with sufficient guardrails in place. In the context of a cell-phone search, the courts must “jealously guard the requirements of the Fourth Amendment, including the particularity requirement.” Searches of digital information are especially vulnerable to a worrisome exploratory rummaging by the government. When executing search warrants, officers are reminded that [MCL 780.657](#) provides a criminal penalty for “any person who in executing a search warrant, wilfully exceeds [their] authority or exercises it with unnecessary severity.”

Lack of Particularity in Carson

In *Carson*, the language in the warrant did not place any limitations on the permissible scope of the search. The only hint of specificity was the warrant’s opening reference to the “investigation of Larceny in a Building and Safe Breaking.” The MSC found this small guardrail was negated by the ensuing instructions to search for such items by searching and seizing the entirety of the phone’s

contents. As written, the warrant authorized a wide-ranging exploratory search, or general warrant, of the kind that the framers intended to prohibit. It allowed the police to search everything, including perhaps unrelated sensitive health records, and specifically identified photographs and videos when there was no basis to believe that any incriminating photos or videos existed. Instead, items to search for that could have been appropriate in this case might have included correspondence between the two defendants, using SMS (Short Message Service), or messages sent through other applications.

Holding

The MSC decided that the search warrant at issue was insufficiently particular, and therefore, the unrestrained search of the defendant's cell phone violated the Fourth Amendment.

The MSC noted that the initial statement of the crime under investigation was a necessary part of the search warrant, but it was not, in and of itself, sufficient to ensure adequate particularity in the context of a cell-phone search warrant. The specification of the crime gives little or no clarity to an officer as to where to look, what to look for and how to look for it. The authorization to search every nook and cranny of the cell-phone data for "any and all records or documents" and "any and all data" related to safe breaking and larceny, provided no meaningful constraint in this case, and resulted in an exploratory rummaging not reasonably directed at obtaining evidence of safe breaking or larceny.

The MSC did not create a per se rule of specificity that applies to cell-phone searches, and they did not rule that search warrants cannot be obtained for cell phones. To the contrary, the MSC explicitly recognized that cell phones can be searched with a search warrant so long as it meets the particularity requirement of the Fourth Amendment. They noted that in many cases, an exact description of what law enforcement should be searching for and where they should search for is not necessarily feasible. The MSC acknowledged that criminals do not always store or organize incriminating information on their digital devices in the most obvious way or in a manner that facilitates the location of the information. However, a search warrant should nevertheless be as particular as the circumstances presented permit and consistent with the nature of the item to be searched. Ultimately, the degree of particularity required to adequately direct a search depends on the crime being investigated and the items sought.

In this case, the search warrant was insufficiently particular. "It allowed officers to comb through every conceivable type of information on the cell phone limited only, at best, to evidence pertaining to the investigation of Larceny in a Building and Safe Breaking." In our modern age, when cell phones carry a virtually unlimited amount of private information, such wide-ranging exploratory rummaging is constitutionally intolerable and clearly violates the Fourth Amendment."

Particularity “Guardrails”

The MSC noted that temporal limitations on the data to be searched can provide important limits. Simply put, when information concerning the relevant time frame of criminal activity exists, this time limitation should be included in the search warrant to ensure adequate particularity.

Another common particularity limit identified by the MSC focuses on the categories of data to be searched. Searching all of the data on a cell phone could violate the particularity requirement (language like “any and all information” or “any and all data”). Although law enforcement may not be certain as to what evidence exists and exactly where it will be located, there is still an obligation to provide the most specific description possible and to support a request to search each category of data mentioned in a warrant affidavit. Search warrants should not provide for boundless searches when the information available provides for a more reasonably tailored search. The broader the scope of the warrant, the stronger the evidentiary showing must be to establish probable cause.

The use of temporal limits and the use of specifying categories of data, as appropriate limiting factors in the search of a cellphone, was recently upheld by the Court of Appeals in light of Carson in *People v. Bogucki*. In *Bogucki*, the warrant included temporal limits, and specifically defined “Digitally stored data to be searched” as: “Web related evidence, Communications evidence, Social networking evidence, Media evidence, Application usage evidence, Operating system evidence, and Location & travel evidence.” The warrant provided detailed definitions for all but one of those terms, as well as the basis for why the affiant believed there was probable cause to search those areas of the cell phone.

“Seizure” of Cell Phone -vs- “Search” of Cell Phone

While the Fourth Amendment applies to both the seizure and search of cell phones, the authority to seize a cell phone (and all of its contents) pursuant to a warrant or a judicially recognized exception does not limit a court’s authority to issue a search warrant which states with particularity, the specific areas of the phone to be searched and the items to be seized. When discussing the issue of particularity with regards to obtaining search warrants for cell phones, a close analogy can be found with a court ordered blood draw.

For example, when a police officer is investigating a potential violation of [MCL 257.625](#) (Drunk Driving) and has probable cause to believe that an individual was operating their vehicle in violation of that statute, they may apply for and obtain a search warrant for that individual’s blood. Such a warrant allows for the collection and preservation of the blood in its entirety (i.e., seizure), however, when analyzing (i.e., searching) the blood, the police are limited to searching that blood for evidence related to the intoxication of the individual (alcoholic liquor, controlled substances, or other intoxicating substances), but are not permitted to search the blood for things outside of the scope of the search warrant, including a DNA profile, a search for health conditions, or a search for diseases the person may have.

Similarly, where the police are investigating a potential violation of [MCL 333.5210](#) (Intercourse-infection with HIV), and they have probable cause to believe that an individual was acting contrary to the statute, it may be relevant to their case to apply for and obtain a search warrant for the individual's blood. Such a warrant allows for the collection of the blood (i.e., seizure), however, when analyzing (i.e., searching) the blood, the police are limited to searching that blood for evidence related to the human immunodeficiency virus (HIV), but are not permitted to search the blood for things outside the search warrant, including a DNA profile, evidence of intoxication, drug use, or diseases unrelated to the investigation, and outside the scope of the warrant.

In other words, just like there are limitations on where and what can be searched for with blood drawn from an individual pursuant to a search warrant, so too with a cell phone. Both necessarily require the seizure of the entirety of a physical sample of blood extracted from a particular person or the seizure of the entirety of a cell phone and its contents extracted from a particular device, but once seized in its entirety, the affidavit and search warrant must identify with particularity what is being searched for and where to search for it. With appropriate limits in place, it allows police the ability to locate and collect relevant evidence pursuant to the warrant, while at the same time, not running every available analysis on a sample of blood or trolling through every piece of data on the phone in a manner that begins to resemble a general warrant.

Considerations

Officers are reminded that although other forms and documents might provide good examples of affidavits and search warrants in specific types of investigations, the [SCAO MC 231](#) provides an easy to use form which not only includes "Instructions for Preparing Affidavit and Search Warrant," but when properly completed and sworn to, would satisfy the minimum requirements of the [Search Warrant Act](#). For example, paragraph 1 calls for:

"The person, place, or thing to be searched is described as and is located at:"

In this paragraph, as it relates to cellphones, officers should provide a description of the cellular phone to be searched, and information as to where the police officer can find that cellular phone.

Similarly, paragraph 2 of the [SCAO MC 231](#) calls for:

"The PROPERTY/PERSON to be searched for and seized, if found, is specifically described as:"

In this paragraph, as it relates to cellphones, officers should list the nature of the crime or crimes being investigated, as well as what they are specifically looking for, stating it with sufficient particularity, to satisfy Fourth Amendment requirements. Additionally, where "temporal limits" (i.e., relevant time frames) can be included to assist with particularity, they should; where categories of data to be searched can be included to assist with particularity, they should.

As with any search warrant, the specific facts of each case will determine exactly what language is most appropriate and case specific questions should be directed to local prosecuting officials for guidance.

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